Supreme Court, U.S.
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In The
Supreme Court of the United States

PATRICIA L. CARUSO,
Director of the Michigan Department of Corrections

Petitioner,

v.

KEVIN MARK ABELA

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The habeas corpus statute contains a 1-year period of limitation that is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . ." 28 U.S.C. § 2244(d)(2).

Does the tolling period of 28 U.S.C. § 2244(d)(2) for a "State post-conviction or other collateral review" application also apply to the time during which a petition for certiorari is pending in this Court after State court denial of such an application?

PARTIES TO THE PROCEEDING

The petitioner (defendant) below was William Martin, who was the Director of the Michigan Department of Corrections. Petitioner Patricia L. Caruso is currently the Director, and she has automatically been substituted pursuant to S.Ct. R. 35.3.

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OPINIONS BELOW

Kevin Mark Abela was convicted on July 24, 1991, of voluntary manslaughter and of carrying a concealed weapon. He was sentenced to seven to fifteen years for the manslaughter conviction and forty months to five years for the concealed weapons conviction with sentences to run concurrently. The Michigan Court of Appeals affirmed Abela's convictions and sentences in an unpublished opinion on July 22, 1994. *People v. Abela,* No. 144005, Michigan Court of Appeals, App. 69a. On March 31, 1995, the Michigan Supreme Court denied Abela's *pro per* delayed application for leave to appeal that made the same claims. *People v. Abela*, No. 100783, Michigan Supreme Court, App. 67a.

The Michigan circuit court denied Abela's post-conviction motion for relief from judgment. *People v. Abela*, No. 90-101083-FC Oakland County Circuit Court, October 22, 1996. App. 66a. Abela's delayed application for leave to appeal the trial court's decision was denied by the Michigan Court of Appeals on July 22, 1997. App 65a. *People v. Abela*, No. 200930, Michigan Court of Appeals. Abela filed an application for leave to appeal in the Michigan Supreme Court, which the Court denied on May 28, 1998, determining that his claims were barred from review by the State's procedural default rule, M.C.R. 6.508(D). *People v. Abela*, 457 Mich. 880; 586 N.W.2d 923 (1998). App 64a.

On August 3, 1998, Abela filed a petition for a writ of certiorari seeking review of the denial of his motion for relief from judgment. This Court denied his petition for a writ of certiorari on October 19, 1998. *Abela v. Michigan*, 525 U.S. 948 (1998). App 63a.

Abela initiated the present cause pursuant to 28 U.S.C. § 2254 by filing his request for habeas corpus relief on April 26, 1999 in the U.S.D.C. for Eastern District of Michigan. The district court found that Abela's habeas corpus petition was timely filed and that he had not procedurally defaulted his claims as had been argued by the State. However, the district court denied each of the claims on the merits. Memorandum Opinion and Order. App 40a. The United States Court of Appeals for the Sixth Circuit affirmed the district court's denial of the writ in a published opinion but based its decision on Abela's lack of compliance with the statute of limitations. *Abela v. Martin*, 309 F.3d 338 (6th Cir. 2002). App 21a. Later, the Court of Appeals granted Abela's motion for *en banc* rehearing on January 21, 2003, vacated its previous opinion and judgment, and reversed the panel's decision. *Abela v. Martin*, 348 F.3d 164; 2003 U.S. App. LEXIS 21359; Fed. App. 0374P (6th Circuit). App 1a.

JURISDICTION

The Court of Appeals' *en banc* decision was entered on October 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns the interpretation of the habeas corpus statute, 28 U.S.C. § 2244, the full text of which is set forth in the Appendix. App 72a.

28 U.S.C. § 2244(d) is relevant to this case and contains the statute of limitations and tolling provision:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The Michigan Court Rules pertaining to post appeal relief, M.C.R. 6.500 *et seq.,* are reproduced in their entirety in the Appendix, beginning at App 75a.

STATEMENT OF THE CASE

Kevin Mark Abela, a State prisoner, was convicted on July 24, 1991 in the Oakland County, Michigan Circuit Court of voluntary manslaughter and of carrying a concealed weapon after he killed Stanley Underwood at a party in Rochester Hills, Michigan. Mr. Underwood was helping to break up a fight when Abela stabbed him. Mr. Underwood died as a result of stab wounds to the chest and left upper arm. He also suffered defensive-type injuries sustained in an attempt to fend off the attacks. He was struck a minimum of seven times with the knife, suffering wounds to his chest, his arms, and his chin. Abela was observed placing a folding knife, consistent with the type of weapon that killed Mr. Underwood, on the ground.

Abela telephoned emergency 911 and admitted that he had "sliced" some people at a party. He agreed to meet the police because he knew he had to, ". . . deal

with the piper." Detective-Sergeant McCabe met Abela in the emergency room of Crittendon Hospital. At that point, Abela had not received medical treatment. Abela gave an audio-taped Statement to the detective admitting that he had pulled his knife out of its sheath and had sliced several people, including a "fat boy."

Prior to making any Statements, Abela told the detective, "Maybe I should talk to an attorney by the name of William Evans." The detective offered to call Mr. Evans or to provide another attorney for him if he wanted. Abela pulled a business card out of his wallet and showed it to the detective who indicated that he would call Mr. Evans for him. The detective then read Abela his Miranda rights after which Abela uttered an obscenity and told the detective that he would tell him everything.

Abela was convicted and was sentenced to a term of 7 to 15 years imprisonment for voluntary manslaughter and to a concurrent term of 40 months to 5 years for the concealed weapon conviction.

Abela's direct appeal concluded when the Michigan Supreme Court denied his delayed application for leave to appeal on March 31, 1995. *People v. Abela*, 448 Mich. 900; 533 N.W.2d 313 (1995). His motion for relief from judgment, filed August 20, 1996, was denied on October 22, 1996. *People v. Abela*, No. 90-101083, Oakland County Circuit Court, October 22, 1996. Appeals of the denial of Abela's motion were concluded when the Michigan Supreme Court denied his delayed application for leave to appeal on May 28, 1998. *People v. Abela*, 457 Mich. 880; 586 N.W.2d 923 (1998). On August 3, 1998 Abela filed a petition for certiorari asking this Court to review the issues

raised in his motion. Certiorari was denied on October 19, 1998. *Abela v. Michigan*, 525 U.S. 948 (1998).

Abela filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 26, 1999 in the Eastern District of Michigan. The district court found the petition timely filed but denied the writ on the merits. *Abela v. Martin*, No. 99-72095 (E.D. Mich 2000). The district court denied the motion for a certificate of appealability. Abela completed his sentence and was discharged from custody on March 1, 2000. The Sixth Circuit Court of Appeals granted a certificate of appealability on April 20, 2001. A panel of that court affirmed the judgment of the district court in a published opinion. *Abela v. Martin*, 309 F.3d 338 (6th Circuit 2000). Later, Abela's motion for *en banc* rehearing was granted and ultimately the court rejected the panel's conclusions and affirmed the holding of the district court that the petition for certiorari to the United States Supreme Court following State court collateral review tolled the habeas corpus statute of limitations. *Abela v. Martin,* 348 F.3d 164; 2003 U.S. App. LEXIS 21359, 2003 FED App. 0374p (6th Circuit).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's *en banc* decision that requires a second tolling period for review by this Court of the denial of post-conviction motions conflicts with the decisions of other United States Courts of Appeal.

The decision of the Sixth Circuit Court of Appeals in this case conflicts with the decisions of other United States Courts of Appeals as to whether the habeas tolling provision for *State* post-conviction or other collateral review extends to certiorari proceedings

before this Court. The Sixth Circuit Court of Appeals framed the key issue in this case as "whether the one-year statute of limitation applicable to federal habeas corpus petitions is also tolled during the period in which a petitioner may seek, and the Supreme Court considers whether to grant, certiorari review of the denial of the petitioner's State collateral relief motion." *Abela v. Martin,* 348 F.3d 164; 2003 U.S. App. LEXIS 21359 * 5, * 11; 2003 FED App. 0374P (6th Cir. 2003). App. 1a. Abela claimed that because he filed a timely petition for a writ of certiorari after the State's denial of his post-conviction motion, the statute of limitation was tolled until this Court denied that petition. The Sixth Circuit agreed. The Court also held that State prisoners filing federal habeas corpus petitions under 28 U.S.C. § 2254 are entitled to an additional 90 day tolling period after the conclusion of State post-conviction proceedings even if no petition for certiorari is ever filed. *Abela* at * 24. App 16a.

The Court of Appeals' decision is inconsistent with the statutory language of the tolling provision, contrary to the holdings of a majority of the circuit courts, and is a misapprehension of this Court's reasoning in related habeas cases. As advised by the dissent, "it is a position which has been repudiated by all other Circuits which have interpreted this statute and is a stretch of the law." *Abela* at * 25 (*Siler, J.* dissenting) App 17a.

A. A majority of the United States Courts of Appeals have held that the habeas tolling provision does not extend beyond *State* post-conviction or other collateral review proceedings.

The consensus of all the circuit courts that have addressed the issue, including the Sixth Circuit prior to

this decision, has been that the 90-day period for seeking United States Supreme Court review of a State court judgment involving a collateral attack on a criminal conviction does not toll the limitations period. The circuits agree that the statute of limitations is not tolled during the pending of review by this Court of the denial of a post-conviction motion. See *Smaldone v. Senkowski*, 273 F.3d 133, 136-138 (2nd Cir. 2001); *Stokes v. District Attorney of the County of Philadelphia*, 247 F.3d 539, 542-543 (3rd Cir. 2001) *cert denied*; 534 U.S. 959 (2001); *Miller v. Dragovich*, 311 F.3d 574 (3rd. Cir. 2002); *Crawley v. Catoe*, 257 F.3d 395, 398-400 (4th Cir. 2001); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999); *Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000) *cert denied*, 532 U.S. 950 (2000); *White v. Klitzkie*, 281 F.3d 920, 923-925 (9th Cir. 2002); *Rhine v. Boone*, 182 F.3d 1153, 1155-1156 (10th Cir. 1999); *Coates v. Byrd*, 211 F.3d 1225, 1226 (11th Cir. 2000); *Isham v. Randle*, 226 F.3d 691,-695 (6th Cir. 2000) *cert denied* 531 U.S. 1201 (2001)

Those circuits finding that petitions for certiorari do not toll the habeas statute of limitations have relied on this Court's reasoning in *Duncan v. Walker*, 533 U.S. 167 (2001), the statutory language, and the distinct separation of this Court from State courts. For example, the Third Circuit determined that it was bound by this Court's decision in *Duncan* that an application for federal review was not a State post-conviction or other collateral review and did not toll the statute of limitations:

> To avoid *Duncan* we would have to hold that Congress intended to distinguish between the exercise of Supreme Court certiorari jurisdiction and federal habeas corpus jurisdiction in enacting § 2244(d)(2).

> Inasmuch as we would not be justified in reaching that conclusion as it would require us in effect to rewrite § 2244(d)(2) we are constrained to affirm the order denying Miller's petition. *Miller*, 311 F.3d at 579.

The Fourth Circuit likewise found that, "[a] petition for writ of certiorari to the United States Supreme Court is simply not an application for State review of any kind; it is neither an application for State post-conviction review nor an application for other State collateral review." *Crawley*, 257 F.3d at 400. (quoting *Rhine v. Boone*, 182 F.3d at 1156). The Fourth Circuit further reasoned that because a petition for certiorari to the Supreme Court was not part of State exhaustion, the United States Supreme Court "is not the court of any State." *Crawley*, 257 F.3d at 400 (quoting *Fay v. Noia*, 372 U.S. 391, 436 (1963)). The court found no reason to "treat a petition of certiorari in the United States Supreme Court differently here." *Crawley, supra.*

The Sixth Circuit acknowledged that its policy regarding tolling is no longer in line with the majority of the circuits. *Abela* at * 11. App 8a.

B. Under the habeas statute of limitations, calculation of the limitations period depends on the finalization of the State court judgment of conviction.

The habeas statute of limitations sets forth a 1-year limitation period that is triggered by the occurrence of the latest of four specified events. The finalization of the State court judgment of conviction is the most commonly encountered of these. The statute of limitations begins to run at the "conclusion of direct review or the time for seeking such review." 28 U.S.C.

§ 2244(d)(1)(A). Review of a State criminal conviction by this Court is considered to be a part of the direct review of that conviction. *Bell v. Maryland*, 378 U.S. 226, 232 (1964). Direct review of a State conviction ends, "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari has elapsed . . . ." *Teague v. Lane*, 489 U.S. 288, 295 (1989). See also *Penry v. Lynaugh,* 492 U.S. 302, 314 (1989).

All circuits have uniformly held that a State court judgment of conviction is not considered final under § 2244(d)(1)(A) until the expiration of the 90 days for seeking certiorari, the pendency of the petition if certiorari is denied, or the completion of review if certiorari is granted, *Anderson v. Litscher*, 281 F.3d 672, 675 (7th Circuit 2002):

> The statute of limitations imposed by § 2244 (d)(1)(A) begins to run (i) when all direct criminal appeals in the State system are concluded, followed by either completion or denial of certiorari proceedings before the United States Supreme Court; or (ii) when, if certiorari was not sought, all direct criminal appeals in the State system are concluded, followed by expiration of the time allotted for filing a petition for writ.

In *Clay v. United States*, 537 U.S. 522, 528 n 3 (2003) this Court stated:

> The Courts of Appeals have uniformly interpreted "direct review" in § 2244(d)(1)(A) to encompass review of a State conviction by this Court. See: *Derman v. United States*, 298 F.3d at 40-41; *Williams v. Artuz,* 237 F.3d 147,

151 (CA2 2001); *Kapral v. United States,* 166 F.3d at 575; *Hill v. Braxton*, 277 F.3d 701, 704 (CA4 2002); *Ott v. Johnson*, 192 F.3d 510, 513 (CA5 1999); *Bronaugh v. Ohio*, 235 F.3d 280, 283 (CA6 2000); *Anderson v. Litscher,* 281 F.3d 672, 674-675 (CA7 2002); *Smith v. Bowersox,* 159 F.3d 345, 347-348 (CA8 1998); *Bowen v. Roe*, 188 F.3d 1157, 1159 (CA9 1999); *Locke v. Saffle*, 237 F.3d 1269, 1273 (CA10 2001); *Bond v. Moore*, 309 F.3d 770, 774 (CA11 2002).

A State court judgment of conviction is, therefore, not finalized until completion of the 90-day time in which a defendant may seek review as permitted by Supreme Court Rule 13(1) or, if review is actually sought, completion of the time during which review is pending.

On the other hand, collateral review is discretionary review granted by a State under its rules. The habeas tolling statute recognizes the nature of State review and limits tolling to the period that post-conviction review is pending in *State* court.

C. The tolling provisions for collateral review of a State court conviction do not extend beyond the conclusion of State court proceedings to include review by this Court.

The habeas statute of limitation is tolled under § 2244 (d)(2), while an "application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."

This Court has said that an application for collateral review is "pending" under this habeas tolling statute until it has "achieved final resolution through the State's post-conviction procedures." *Carey v. Saffold*, 536 U.S. 214, 220 (2002). *Carey* addressed the meaning of "pending" solely in the context of State proceedings and its conclusion is relevant to the question here. Conclusion of proceedings in the State court means that an application for collateral review is no longer "pending" there.

This Court has further determined that the word "State" modifies both the words "post-conviction" and "other collateral review" in this tolling provision. *Duncan,* 533 U.S. 167, 173 (2001). While *Duncan* addressed the meaning of "State" in making the determination that federal habeas proceedings were not intended to be included under "other collateral review" in § 2244(d)(2). The Court's reasoning is equally applicable to the question here. In *Duncan*, 533 U.S. at 172-173, this Court concluded that Congress, by omitting the word "Federal" in § 2244(d)(2) when it had included the words "State" and "Federal" in habeas provisions §§ 2254(i), 2261(e) and 2264(a)(3), demonstrated that:

> Congress did not intend properly filed applications for federal review to toll the limitations period. It would be anomalous, to say the least, for Congress to usher in federal review under the general rubric of "other collateral review" in the statutory provision that refers expressly to "State" review, while denominating expressly both "State" and "Federal" proceedings in other parts of the same statute. The anomaly is underscored by the fact that the words "State" and "Federal" are likely to be of no small import when Congress drafts a statue that governs federal collateral review of State court judgments.

This Court's interpretations of the statutory phrases within the tolling provision necessitates the conclusion that "state collateral review" terminates at the end of State court proceedings and does not extend beyond those State proceedings to requests for review by this Court.

D. The decision of the Court of Appeals is derived from a misapprehension of this Court's reasoning in *Carey, Duncan*, and *Clay*.

In *Isham v. Randle*, 226 F. 3d 691, 695 (6th Cir. 2000), the Sixth Circuit Court of Appeals previously concluded that no tolling applied where a petitioner could have but did not seek certiorari review of denial of post conviction relief. In *Abela* that position was repudiated because the Court of Appeals determined that subsequent decisions of this Court required a different conclusion. The Court relied on *Carey, Duncan,* and *Clay* in reaching its conclusion that certiorari proceedings in the United States Supreme

Court were a continuation of State collateral review and therefore tolled the habeas statute of limitations.

The State submits that conclusion was unwarranted and incorrect. The Court of Appeals failed to apply the plain language of the statute. Instead, the *Abela* Court referred to *Carey* regarding the meaning of "pending" and took the position that, since pending means "not yet decided" or "until completion," "as long as the petition for certiorari involves an application for State court relief, section 2244(d)(2) requires that the statute of limitations be tolled." *Abela* at * 17, App 11a. The Court further concluded that "[t]he court *where* the application is pending is irrelevant." (Emphasis added) It justified that position saying, "[w]hile *Duncan* clarified that 'State' modifies 'review,' it nowhere asserts that 'State' also modifies 'pending.'" *Id.* The Court of Appeals relied on the dissent in *White v. Klitzkie*, 281 F.3d 920, 926-927 (9th Cir. 2002) that determined that collateral review of a State criminal conviction should still be regarded as pending if a certiorari petition has been filed "even though the State courts are finished with it."

The State submits that an examination of the statutory language in the habeas tolling provision reveals that "State" modifies "post-conviction or other collateral review" and refers to the pendency of those "State" proceedings. See *Duncan, supra. Where* the application is pending matters because the tolling provision has defined the consequences of that pendency. The argument that this Court has jurisdiction to hear State cases presenting federal issues is unpersuasive given that Congress did not explicitly provide for such tolling. *Id.*

The *Abela* Court was likewise mistaken in its reliance on *Clay*. The Court found that *Clay* offered an analogy since this Court "determined that a *federal* criminal conviction becomes final, for the purposes of calculating the one-year time period in which to move to vacate pursuant to 28 U.S.C. § 2255, when the time expires for filing a petition for certiorari to contest the federal appellate court's affirmance of conviction." *Abela* at * 9. (Emphasis added.) App 7a. A fair reading of *Clay*, however, reveals that this Court only intended to accord the same 90-day tolling period to *federal* prisoners seeking habeas relief under § 2255(1) that was already provided to *State* prisoners seeking habeas relief under § 2244(d)(1)(A). To deny federal prisoners the same tolling period that was provided for State prisoners "would hold a § 2255 petitioner to a greater time constraint than the petitioner governed by § 2244(d)(1)(A)." *Clay*, 537 U.S. at 529-530. Thus, "the conclusion of direct review" for State petitioners in "§ 2244(d)(1)(A) is the functional equivalent of "the date on which the judgment of conviction becomes final" for federal petitioners in § 2255(1). Nothing in *Clay* should have led to the Court of Appeal's determination that State petitioners are entitled to a second 90-day period of tolling after the denial of a motion for post conviction relief in the State court.

E. The legislative scheme reflected in the statute of limitations that provides tolling only for State court collateral review promotes comity and finality for State court judgments of conviction.

The *Abela* Court advanced the proposition that extension of tolling for collateral review beyond State proceedings and into certiorari proceedings before this Court would favorably address concerns about comity,

exhaustion, finality, and an unstable limitations scheme. *Abela* at * 18, App 13a.

The State disagrees. The tolling provision, by its express language and as interpreted by the majority of circuits, equally addresses those concerns although in a different manner. Termination of tolling after State court proceedings recognizes the varied State court systems and their interest in defining and limiting discretionary review of their already finalized convictions. There is no difficulty in determining when State court collateral review terminates. Petitioners would face no uncertainty in determining when a petition for habeas relief would need to be filed. Timely filing would need to occur within the time remaining on the one-year statute of limitations excluding the tolled time period in *State* court. Habeas proceedings would be unaffected where certiorari review was not sought. In those very limited cases where certiorari was actually sought, the district court could hold the habeas case in abeyance pending this Court's decision on post-conviction review. See, *Miller*, 311 F.3d at 580-581.

Finally, extension of tolling to include review by this Court of state post conviction proceedings would not necessarily foster finality or ease of determination of the tolling period. For example, prior to August 1, 1995, Michigan permitted prisoners to file successive post-conviction motions for relief. See M.C.R. 6.502(G); App 77a. The rule in *Abela* would seem to require a tolling period of at least 90 days after the denial of each such motion. Other States may have yet other collateral review rules. Extension of tolling beyond the State-determined plan unduly extends the time during which a State conviction is subject to review. The State submits that its interest in the finality

of its convictions and the right of the convicted petitioner to seek habeas review are both preserved by limitation of tolling to the statutorily prescribed pendency for State collateral proceedings.

F. The facts in this case undisputedly show that the statute of limitations was expired when Abela filed his habeas petition more than one year after finalization of his judgment of conviction, excluding the time post-conviction review was pending in *State* court.

Abela's conviction was affirmed by the Michigan Supreme Court on March 31, 1995, which was prior to passage of the AEDPA. Where a newly enacted statute of limitations shortens the time for filing suit, a party against whom the limitations period has already run must be given a "reasonable time" to file suit. *Ochoa v. Hernandez*, 230 U.S. 139, 161-162 (1912). All of the circuits that have considered the question have concluded that it is reasonable to allow a litigant the benefit of the full one-year. *Ross v. Artuz,* 150 F.3d 97, 100-101 (2nd Cir. 1998), *Searcy v. Carter*, 246 F.3d 515, 517 (6th Cir. 2001); *Burns v. Morton*, 134 F.3d 109, 111 (3rd Circuit 1998); *Lindh v.* Murphy, 96 F3d 856, 866 (7th Circuit 1996), reviewed in other grounds, 521 45 320 (1997); *Calderon v United States District Court for the Central District of California*, 128 F.3d 1283, 1287 (9th Circuit 1997).

The statute of limitations began to run in Abela's case with the passage of the AEDPA on April 24, 1996 and ran for 118 days until it was tolled by the filing of his motion for post-conviction relief on August 20, 1996. Abela's appeal of the trial court's decision was completed on May 28, 1998 when the Michigan

Supreme Court denied his delayed application for leave to appeal pursuant to M.C.R. 6.508(D) because of his procedural default. At that point, the statute of limitations began to run again. The habeas corpus petition was not filed until 333 days later on April 26, 1999. A total of 451 days elapsed before Abela filed his petition. His habeas corpus petition should, therefore, have been barred from review by the one-year statute of limitations, which expired on January 30, 1999.

CONCLUSION

For all the above-Stated reasons, Petitioner respectfully requests this Honorable Court to grant Certiorari and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

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KEVIN MARK ABELA,
Petitioner-Appellant,
v.
WILLIAM MARTIN,
Director, MICHIGAN DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

No. 00-2430

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

348 F.3d 164; 2003 U.S. App. LEXIS 21359; 2003 FED App. 0374P (6th Cir.)

March 26, 2003, Argued
October 22, 2003, Decided
October 22, 2003, Filed

COUNSEL: ARGUED: James Sterling Lawrence, Detroit, Michigan, for Appellant.

William C. Campbell, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

ON BRIEF: James Sterling Lawrence, Detroit, Michigan, for Appellant.

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JUDGES: Before: BOGGS, Chief Circuit Judge; MARTIN, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, and ROGERS, Circuit Judges. MARTIN, J., delivered the opinion of the court, in which DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, JJ., joined. SILER, J., delivered a separate dissenting opinion, in which BOGGS, C. J., BATCHELDER, GIBBONS, and ROGERS, JJ., joined.

OPINION BY: BOYCE F. MARTIN, JR.

OPINION: [*165] [***2]

BOYCE F. MARTIN, JR., Circuit Judge. This action arises from a Michigan manslaughter conviction and subsequent petition for a writ of habeas corpus pursuant to *28 U.S.C. § 2254*. The district court found the habeas petition timely filed but denied it on the merits. Kevin Mark Abela appealed [**2] that denial. A panel of this [*166] court heard argument in this case, but it declined to reach the merits. The panel held that under this court's rule in *Isham v. Randle, 226 F.3d 691 (6th Cir. 2000), cert. denied, 531 U.S. 1201, 149 L. Ed. 2d 124, 121 S. Ct. 1211 (2001)*, Abela's petition was not timely because the statue of limitations was not tolled by Abela's petition for writ of certiorari from the United States Supreme Court following post-conviction litigation in state court. The panel held that Abela's habeas petition was barred by the statute of limitations set forth in *28 U.S.C. § 2244(d)(1)*. A majority of the active judges of this court having agreed to rehear the case *en banc*, we now hold that Abela's petition was timely filed. [***3]

Abela was convicted by a jury of voluntary manslaughter and carrying a concealed weapon on July

24, 1991. He was sentenced to a term of seven to fifteen years for voluntary manslaughter and a concurrent sentence of forty months to five years for carrying a concealed weapon.

Abela appealed his conviction on February 17, 1992, by raising three issues in the Michigan Court of Appeals. [**3] The Michigan Court of Appeals affirmed Abela's conviction and sentence in an unpublished disposition. *People v. Abela*, No. 144005 (Mich. Ct. App. July 22, 1994). The Michigan Supreme Court denied Abela's delayed application for leave to appeal these issues. *People v. Abela, 448 Mich. 900, 448 Mich. 901, 533 N.W.2d 313; 1995 Mich. LEXIS 312 (Mich. 1995).*

On August 20, 1996, Abela filed a motion for relief from judgment in the Oakland County Circuit Court, raising six claims. The motion was denied "for lack of merit on the grounds presented." *People v. Abela*, No. 90-101083 (Oakland County Cir. Ct. Oct. 22, 1996). Abela raised the same six issues on appeal to the Michigan Court of Appeals, which also denied leave to appeal and a motion to remand. *People v. Abela*, No. 200930 (Mich. Ct. App. July 22, 1997). On August 9, 1997, Abela again raised these six issues in his delayed application for leave to appeal to the Michigan Supreme Court, which likewise denied his petition. *People v. Abela, 457 Mich. 880, 586 N.W.2d 923 (Mich. 1998).* On August 3, 1998, Abela filed a petition for certiorari with the United States Supreme Court, which was denied on October 19, 1998. *Abela v. Michigan, 525 U.S. 948, 142 L. Ed. 2d 309, 119 S. Ct. 374 (1998).* [**4]

On April 26, 1999, before his parole term had ended, Abela sought a writ of habeas corpus pursuant to *section 2254*, raising the same claims as in his motion for relief from judgment (except for his claim regarding

the trial court's decision to reconsider its dismissal of the concealed weapon charge). The district court issued a memorandum opinion and denied the petition for habeas relief on October 31, 2000. On [***4] December 28, 2000, the district court denied Abela's motion for a certificate of appealability.

Abela appealed his denial of the motion to this court. We granted his certificate of appealability on the issues before us on April 20, 2001.

Between August 20, 1996, and May 28, 1998, Abela sought state collateral relief in the Michigan trial, appellate, and high courts. The limitations period was clearly tolled during this period because Abela's state collateral relief motions were pending in the various state courts. *See Carey v. Saffold, 536 U.S. 214, 220, 153 L. Ed. 2d 260, 122 S. Ct. 2134 (2002).* In *Carey*, the Court held that "until the application has achieved final resolution through the State's post-conviction procedures, by definition it [**5] remains 'pending.'" *Id.* Thus, the key issue before us today is whether the one-year statute of limitations applicable to federal habeas corpus petitions is also tolled during the period in [*167] which a petitioner may seek, and the Supreme Court considers whether to grant, certiorari review of the denial of the petitioner's state collateral relief motion.

Title *28 U.S.C. § 2244(d)(1)* provides a one-year period of limitations for people "in custody pursuant to the judgment of a State court" to file an application for a writ of habeas corpus. Title *28 U.S.C. § 2244(d)(2)* provides for tolling of this one-year period as follows: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

For prisoners whose convictions became final prior to April 24, 1996, the effective date of the *Anti-Terrorism and Effective Death Penalty Act*, the one-year limitations period runs against them as of that date. *Austin v. Mitchell, 200 F.3d 391, 393 (6th Cir. 1999).* [**6] Abela's judgment of conviction became final prior to April 24, 1996, so his one-year limitations period began running on that date. [***5]

The Supreme Court recently concluded that a federal habeas corpus petition does not constitute "State post-conviction or other collateral review" in order to toll the one-year limitations period pursuant to *section 2244(d)(2). Duncan v. Walker, 533 U.S. 167, 182, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001).* Significantly, for our purposes, the Court construed the phrase "State post-conviction or other collateral review" to mean "State post-conviction [review]" and "other State collateral review." *Id. at 175-76.* Accordingly, the *section 2241(d)(1)* limitations period is not tolled while federal habeas corpus proceedings are pending, because federal habeas proceedings are neither "State post-conviction" nor "other State collateral review." *Id. at 181-82.* Thus, the more narrow question presented here is whether a petition for writ of certiorari to the Supreme Court may constitute a "properly filed" and "pending" application for "State post-conviction [review]" or "other State collateral review" [**7] so as to toll the *section 2244(d)(1)* limitation period.

This Court's pre-*Duncan* decision in *Isham v. Randle, 226 F.3d 691 (6th Cir. 2000), cert. denied, 531 U.S. 1201, 149 L. Ed. 2d 124, 121 S. Ct. 1211 (2001),* upon which the panel opinion relied, dealt with the situation where a petitioner could have sought, but did not seek, certiorari review of his Ohio collateral review motion. We held that "the one year limitations period is not tolled during the ninety days in which defendant

could have petitioned the Supreme Court for a writ of certiorari . . . ." *Id. at 692.*

First, we reasoned, based on the statute's plain language, the word "State" in *section 2244(d)(2)* modifies "post-conviction or other collateral relief." *Id. at 695.* This court concluded that "[a] petition for certiorari to the United States Supreme Court is not 'state post-conviction relief.' Neither is such a petition 'other state collateral relief.'" *Id.* Thus, we decided, as had the Tenth Circuit, that "a petition for writ of certiorari to the United States Supreme Court is 'simply not an application for state review of any kind.'" *Id.* [**8] (citing *Rhine v. Boone, 182 F.3d 1153, 1156 (10th Cir. 1999)).* We also reasoned that our holding was bolstered by the fact that [***6] seeking certiorari in the United States Supreme Court is not a mandatory part of state court review, as it is not a prerequisite to pursuing habeas corpus. *Fay v. Noia, 372 U.S. 391, 435, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963).* Finally, we concluded that differences in *section 2244(d)(1)(A)* and *section 2244(d)(2)* suggest that Congress did not intend *section 2244(d)(2)* tolling [*168] to apply to potential Supreme Court review. *Isham, 226 F.3d at 695.* Specifically, *section 2244(d)(1)(A)* provides that the one-year limitations period begins to run after "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," whereas Congress neglected to use similar language in *section 2244(d)(2). Id.*

The Supreme Court has decided cases since *Isham* that cast that case in a different light. As to *Isham*'s first rationale, *Duncan* confirmed our interpretation that the word "State" in *section 2244(d)(2)* modifies "post-conviction or other [**9] collateral relief." *533 U.S. at 175-76.* As to *Isham*'s second rationale, that petitioning for certiorari on the underlying conviction is not

required in order to seek habeas corpus review, the Supreme Court's recent decision in *Clay v. United States, 123 S. Ct. 1072, 1075, 537 U.S. 522, 155 L. Ed. 2d 88 (2003)*, offers an analogy for the question before us. In that case, the Court determined that [HN6] a federal criminal conviction becomes final, for the purposes of calculating the one-year time period in which to move to vacate pursuant to *28 U.S.C. § 2255*, when the time expires for filing a petition for certiorari to contest the federal appellate court's affirmance of conviction. *Id. at 1075*. The Court discussed the meaning of finality, *id. at 1076*:

> Here, the relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. *See, e.g., Caspari v. Bohlen, 510 U.S. 383, 390, 114 S. Ct. 948, 127 L. Ed. 2d* [***7] *236 (1994)*; [**10] *Griffith v. Kentucky, 479 U.S. 314, 321, n. 6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)*; *Barefoot v. Estelle, 463 U.S. 880, 887, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)*; *United States v. Johnson, 457 U.S. 537, 542, n. 8, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982)*; *Linkletter v. Walker, 381 U.S. 618, 622, n. 5, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965)*.

Further, the Court noted that "the Courts of Appeals have uniformly interpreted 'direct review' in *§ 2244(d)(1)(A)* to encompass review of a state conviction by this Court." *Clay, 123 S. Ct. at 1077, n.3*

(citations omitted). The reasoning underlying the Court's decision in *Clay* is analogous to the situation before us. The Supreme Court's direct review of a federal criminal conviction is not identical to its review of a state habeas petition, but in each situation the decision of the federal appellate court and the highest court in the state, respectively, is not final, if certiorari is sought, until the Supreme Court denies certiorari, and, if certiorari is not sought, until the period for seeking certiorari expires.

Finally, as to *Isham* [**11] 's third rationale, highlighting the difference in language between *sections 2244(d)(1)(A) and 2244(d)(2)* as supportive of the narrow reading of the latter, the Supreme Court recently said, "The . . . presumption -- that the presence of a phrase in one provision and its absence in another reveals Congress'[s] design -- grows weaker with each difference in the formulation of the provisions under inspection.'" *Clay, 123 S. Ct. at 1079* (citing *Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 435-36, 153 L. Ed. 2d 430, 122 S. Ct. 2226 (2002))*.

Isham, nevertheless, is in line with the majority of our sister circuits. The Tenth Circuit concluded, using broad language, that *section 2244(d)(2)* did not toll the limitations period where the petitioner had actually sought certiorari in the Supreme Court. *Rhine, 182 F.3d at 1156*. The [*169] Fourth Circuit agreed where, as here, the petitioner had actually sought certiorari. *Crawley v. Catoe, 257 F.3d 395, 399-400 (4th Cir. 2001)*. [***8] Other circuits, relying on *Rhine*, have reached the same conclusion with respect to petitioners who had not actually sought [**12] certiorari review -- the scenario presented in *Isham*. *See Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir. 2001)*; *Bunney v. Mitchell, 262 F.3d 973, 974 (9th Cir. 2001)*; *Coates v. Byrd, 211 F.3d 1225, 1227(11th Cir. 2000)*; *Ott v. Johnson, 192*

F.3d 510, 513 (5th Cir. 1999); *see also Isham, 226 F.3d 691.*

Until recently the Third Circuit distinguished situations where certiorari is actually sought from those where it is not. In particular, in 1999, the Third Circuit concluded that the limitations period was tolled during the period where a petitioner actually sought certiorari. *See Morris v. Horn, 187 F.3d 333, 336-37 (3d Cir. 1999).* However, subsequent to the decision in *Morris*, the Third Circuit concluded that the ninety-day period for seeking certiorari review in the Supreme Court should not be considered to toll the limitations period under *section 2244(d)(2)* where the petitioner has not actually sought certiorari. *See Nara v. Frank, 264 F.3d 310, 318* & n.4 (3d Cir. 2001); *Stokes v. Dist. Attorney of the County of Phila., 247 F.3d 539 (3rd Cir. 2001).* [**13] This distinction relied on the use of the word "pending" in *section 2244(d)(2)*, concluding that where no petition for certiorari is actually filed, nothing can be "pending" under *section 2244(d)(2). Nara, 264 F.3d at 318.* Recently, however, the Third Circuit abandoned this distinction altogether, joining the majority of the circuits. *See Miller v. Dragovich, 311 F.3d 574 (3d Cir. 2002).* The court said, "To avoid *Duncan* we would have to hold that Congress intended to distinguish between the exercise of Supreme Court certiorari jurisdiction and federal habeas corpus jurisdiction in enacting *section 2244(d)(2)." Id. at 579.*

The Second and Seventh Circuits adopted a narrow version of the approach taken in *Isham*, *Coates*, *Ott*, *Miller*, and *Rhine*, limiting their holdings to a rule that the period during which certiorari may be sought cannot toll the limitations period where certiorari is not actually sought. [***9] *See Gutierrez v. Schomig, 233 F.3d 490, 491-92 (7th Cir. 2000)*; *Smaldone v. Senkowski, 273 F.3d 133, 137-38 (2d Cir. 2001).* The

Seventh Circuit focused on whether there [**14] was any "properly filed" application where the petitioner had not sought certiorari to the United States Supreme Court, concluding that where nothing had been filed, nothing could be "properly filed" under *section 2244(d)(2). Gutierrez, 233 F.3d at 492.* The Seventh Circuit also concluded that where no petition for certiorari had been filed, nothing could be "pending" under *section 2244(d)(2). Id.* Ultimately, however, the Seventh Circuit declined to address whether "State post-conviction" review or "other state collateral review" may include a "properly filed," "pending" petition for certiorari to the United States Supreme Court. *Id.* The Second Circuit, likewise faced with a situation where the petitioner had not sought certiorari, adopted the reasoning of the Seventh Circuit, stating, "Our holding is limited to the facts of this case, and we do not reach the questions that would have been raised if a certiorari petition had been properly filed." *Smaldone, 273 F.3d at 138.* The Second and Seventh Circuits continue to distinguish between situations in which a petition for certiorari review of the denial of state habeas relief is actually sought [**15] and those cases where it is not.

Although we find this distinction no longer tenable, we take each situation in turn. First, as to the question presented [*170] here, where a petition for certiorari was actually filed, we find instructive the reasoning of the dissent in *White v. Klitzkie, 281 F.3d 920 (9th Cir. 2002).* In dissent in *White*, Judge Berzon reasons that "the statute surely tolls only where there is a 'properly filed application for *State* post-conviction or other collateral review.' But the question is not whether White's application fits this description . . . but whether that application could still be 'pending' once the state courts are finished with it." *Id. at 926* (Berzon, J., dissenting). She goes on to say, *id.*,

> While the *application* is one for *State* post-conviction relief, just as state criminal proceedings can raise federal [***10] issues reviewable in the United States Supreme Court, so can state habeas proceedings. A state criminal proceeding . . . is still "pending" even though the state courts are finished with it, until any petition filed is finally decided. Similarly, if there is a certiorari petition [**16] pending to review the validity of the state's denial of such an application for state post-conviction review, the *application* is still "pending" -- that is, not finally decided. The application does not thereby stop being a state habeas proceeding or turn into a federal rather than a state application; it is just not finally decided yet.

We agree. In a slightly different context, the Supreme Court, in *Carey v. Saffold*, discussed the word "pending": "The dictionary defines 'pending' (when used as an adjective) as 'in continuance' or 'not yet decided.' It similarly defines the term (when used as a preposition) as 'through the period of continuance . . . of,' 'until the . . . completion of.'" *536 U.S. at 219* (citing Webster's Third New International Dictionary 1669 (1993)). We believe that a petition for certiorari from a state court's denial of an application for habeas corpus necessitates that the application is still pending, because it is "'in continuance' or 'not yet decided.'" *Id.* The focus of *section 2244(d)(2)* is not on the court in which the application is pending but on the application itself. As long as the petition for certiorari involves an [**17] application for state court relief, *section 2244(d)(2)* requires that the statute of limitations be

tolled. The court where the application is pending is irrelevant. While *Duncan* clarified that "State" modifies "review," it nowhere asserts that "State" also modifies "pending."

Judge Berzon's dissent in *White* continues, *281 F.3d at 926-27*:

> *Duncan v. Walker, 533 U.S. 167, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)*, does not suggest a different interpretation of *§ 2244(d)(2)*. That case based its holding that a federal habeas petition does not toll the [***11] limitations period on the ground "that an application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of *28 U.S.C. § 2244(d)(2)*." *Id. at 2129*. But an application for state habeas review, as opposed to an application for federal habeas review, is "an application for State post-conviction review or other collateral review," regardless of whether that application is being considered on appeal by a state supreme court or by the United State Supreme Court on certiorari. Thus, unlike [**18] the reading of *§ 2244(d)(2)* rejected in Duncan, the interpretation I suggest gives full meaning to the word "State," but recognizes that the United States Supreme Court . . . can consider state . . . cases when they raise federal issues. Otherwise, what is the United States Supreme Court hearing when it considers a state habeas petition on certiorari? Not an application [*171] for federal post-conviction or other collateral review.

We agree with Judge Berzon's reasoning.

Furthermore, to require a petitioner to file his petition seeking federal habeas corpus relief before he has sought certiorari to the Supreme Court does not promote the finality of state court determinations and encourages the simultaneous filing of two actions seeking essentially the same relief. This disposition would also raise concerns about comity and exhaustion. If we chose to follow the panel decision in this case, a prisoner could file his petition for writ of certiorari to the United States Supreme Court on the day the highest state court denies him collateral relief, but if the United States Supreme Court takes more than a year to decide his case, the prisoner will be required to file a federal habeas [**19] petition before the Supreme Court had an opportunity to rule on his motion for state collateral relief. We doubt that Congress intended, in the *Anti-Terrorism and Effective Death Penalty Act, to* force prisoners to choose between federal habeas relief and seeking certiorari to the Supreme Court, or to do both simultaneously. While as a practical matter it is unlikely that [***12] many petitioners will be put in this position, because the federal habeas court could simply stay the habeas motion pending the Supreme Court's resolution of the certiorari petition, *see Miller, 311 F.3d at 580-81*, we do not believe it is appropriate or necessary to read the federal statutes to dictate such a rule.

We now turn to the question directly at issue in *Isham*, although not presented here, whether or not the period for filing certiorari tolls the statute of limitations where no petition is actually filed. Once a state supreme court has ruled on a petitioner's application for state post-conviction relief, the petitioner has ninety days to decide whether to petition for a writ of

certiorari. *Sup. Ct. R. 13. Section 2244(d)(2)* provides that the one-year statute of limitations [**20] is tolled while a properly filed application for state post-conviction relief is "pending," *28 U.S.C. § 2244(d)(2)*, but it offers no clue as to whether an application is "pending" during the ninety-day period for seeking Supreme Court review. If that determination depends on whether a petitioner ultimately applies for a writ of certiorari, then courts and litigants can never know whether the statute of limitations is running during the period following their state post-conviction review; that determination will depend on events that are to happen down the road.

Indeed, petitioners who are equally diligent may face drastically different fates. Imagine, for example, two state inmates who file their petitions for state post-conviction relief after three hundred days in their limitation period have run. Sixty-five days after their applications for state post-conviction relief are denied, having passed through the highest appellate court in the state, their limitations period under *section 2244(d)(1)* will expire. On the seventieth day, each proceeds to another stage in the process: one files a petition for habeas corpus relief in federal district court, and because [**21] that petition is untimely, the petition is denied; the other petitions for a writ of certiorari from the United States Supreme Court, and not only is the petition accepted for [***13] filing, but also the petitioner still has sixty-five days left to file a habeas corpus petition after the petition for a writ of certiorari is denied. That is, the petition for writ of certiorari would have *retroactively* tolled the second petitioner's limitations period, protecting his ability to seek *section 2254* relief. The first petitioner, who was equally diligent -- and who chose what is likely a more efficient route to federal habeas review -- will be out of luck. Furthermore, a [*172] rule limiting the tolling to only

those habeas corpus petitioners who actually file for certiorari would create a lock-in effect for the prison inmate who prepares a certiorari petition for sixty-nine days, but then changes tack on the seventieth day, deciding that it would be wiser strategically to file the habeas petition in the district court. Under the rule applied by a majority of our sister circuits, the inmate has to file a protective certiorari petition in order to preserve the opportunity to later file a [**22] habeas petition, generating an unnecessary and quite often futile hoop through which the inmate must hop. Failure to file such a protective certiorari petition because of a tactical change then retroactively obliterates the sixty-five days the inmate had left, even though the clock was not actually ticking during the sixty-nine days spent preparing the certiorari petition to the Supreme Court.

It makes little sense to allow events that happen after a limitations period appears to have expired to retroactively toll it, and the Supreme Court has explicitly rejected such a suggestion for collateral attacks by federal prisoners. In *Clay,* the Supreme Court held that the limitations period for a *section 2255* petition does not run during the ninety-day period for seeking certiorari, even when the petitioner ultimately does not seek Supreme Court review. *123 S. Ct. at 1075.* The only possible basis for distinguishing the Court's interpretation in *Clay* is that whereas there, the Court determined that a case does not become "final" in the postconviction context until the conclusion of the time for seeking Supreme Court review, here, a court would be asked to determine when [**23] an application is no longer "pending." Although a case may not be "final" until the ninety-day [***14] period has expired, the argument goes, it is no longer "pending" once the state court has actually issued an order. This argument overlooks the almost tautological point that a case becomes "final" once it is no longer

"pending"; they are but two sides of the same coin. Moreover, in *Carey*, the Supreme Court rejected the notion that a case is only "pending" for the purposes of *section 2244(d)(2)* until the court issues its order. *536 U.S. at 219-20*. The Court there concluded that an application for state post-conviction relief is pending even during the period between one state court's decision and the litigant's appeal to the next level. Accordingly, "pending" should not be construed to refer only to the time a court takes to evaluate a case at some stage of the post-conviction review process; "pending" also refers to the time allowed an inmate to file a certiorari petition regardless of whether such filing actually occurs.

A statute of limitations should be clear. At any given point, courts and litigants should be able to determine whether the limitations period [**24] has begun, is running, is tolled, or has expired; whether a limitations period is running should not depend on events that happen only at a later date. Whether the limitations period is tolled during the ninety days that a petitioner has to seek certiorari should not depend on whether the petitioner actually decides to seek certiorari.

Because *Clay* explicitly holds that *federal* petitioners are to receive the benefit of the ninety-day certiorari period even when they seek no such relief, because *Carey* advances a broad definition of when a petition for state relief is "pending" under *section 2244(d)(2)*, and because the contrary view leads to an unstable limitations scheme prone to subsequent revision, we hold that under *section 2244(d)(2)*, the statute of limitations is tolled from the filing of an application for state post-conviction or other collateral relief until the conclusion of the time for seeking Supreme [*173] Court review of the state's final

judgment on that application independent of whether the petitioner actually petitions the Supreme Court to review the case. [***15]

For the foregoing reasons, we AFFIRM the judgment of the district court with respect to the [**25] timeliness of Abela's habeas petition, and the case is otherwise returned to the original panel for consideration on the merits.

DISSENT BY: SILER

DISSENT: [***16]

SILER, Circuit Judge, dissenting. The position espoused by the majority sounds good and provides an easy way to determine whether the one-year limitations period under *28 U.S.C. § 2244(d)(1)* is tolled. However, it is a position which has been repudiated by all other Circuits which have interpreted this statute and is a stretch of the law. After all, "Our task is to construe what Congress has enacted. We begin, as always, with the language of the statute." *Duncan v. Walker, 533 U.S. 167, 172, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001).*

As the majority correctly analyzes the issue, it is whether the time under *28 U.S.C. § 2244(d)(2)* for tolling purposes also includes the time between the denial of petitioner's state post-conviction claim and the denial of his petition for a writ of certiorari on that claim before the Supreme Court. The majority holds that this time is also included. We previously held in *Isham v. Randle, 226 F.3d 691, 692 (6th Cir. 2000),* [**26] *cert. denied, 531 U.S. 1201, 149 L. Ed. 2d 124, 121 S. Ct. 1211 (2001),* that the time was not included for tolling purposes when the petitioner did not seek certiorari review of his collateral attack. I would extend that holding from *Isham* to the present situation, where

the petitioner did file for certiorari to the Supreme Court. In addition to refusing to apply *Isham*'s reasoning to circumstances in which the petitioner has filed for certiorari review following exhaustion of post-conviction relief, the majority of this court, while conceding that the issue is not properly before us, nonetheless suggests in dicta that *Isham* itself is not good law. Rather than casting doubt upon *Isham*, I would extend its holding to the present situation, in which the petitioner did file for certiorari to the Supreme Court. Thus, I would find that the time between May 28, 1998, when the Michigan Supreme Court denied leave on Abela's motion for relief from judgment until October 19, 1998, when the Supreme Court denied certiorari, is not excludable time for [***17] tolling under *28 U.S.C. § 2244(d)(2)*. The reasons are explained herein.

As [**27] the majority explains, there is no Circuit authority in Abela's favor. *Morris v. Horn, 187 F.3d 333, 337 (3d Cir. 1999)*, is the only case to hold that the statute of limitations is tolled under *§ 2244(d)* during the pendency of a petition for certiorari, following the denial of post-conviction relief. However, that case has been repudiated in *Miller v. Dragovich, 311 F.3d 574, 580 (3d Cir. 2002)*. The majority has recognized the plethora of authority in agreement with *Isham* and *Miller. See, e.g, Bunney v. Mitchell, 241 F.3d 1151, 1155-56 (9th Cir.), withdrawn on other grounds, 249 F.3d 1188 (9th Cir. 2001)*; *Crawley v. Catoe, 257 F.3d 395, 399-400 (4th Cir. 2001)*; *Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir. 2001)*; *Coates v. Byrd, 211 F.3d 1225, 1227 (11th Cir. 2000)*; *Ott v. Johnson, 192 F.3d 510, 513 (5th Cir. 1999)*; *Rhine v. Boone, 182 F.3d 1153, 1156 (10th Cir. 1999)*.

The authority the majority here uses to justify its decision is from a dissent by Judge Berzon in *White v.*

Klitzkie, 281 F.3d 920, 926 (9th Cir. 2002) [**28] (Berzon, J., dissenting). But the majority in that case very clearly held that "[a] petition for a writ of certiorari to the United States Supreme [*174] Court is simply not an application for state review." *Id. at 924.*

All of these cases follow the same basic reasoning. That is, they hold that the time under which a petition for certiorari is or could be filed is not considered the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *28 U.S.C. § 2244(d)(2).* I would adopt that reasoning also.

The plain text of the statute does not suggest otherwise. Obviously the pragmatic approach has its merits, because it promotes an efficient administration of habeas corpus cases, but if Congress sees a need to change the system, it may amend the statute just as it has in the past. The recent [***18] decisions in *Clay v. United States, 537 U.S. 522, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003)*; and *Duncan, 533 U.S. at 167*, do not affect our decision in *Isham.*

More specifically, *Duncan* construed *§ 2244(d)(2)* [**29] in the same way that *Isham* did, that is, that "State" modified both "post-conviction" and "other collateral review." *Duncan, 533 U.S. at 172.* Likewise, *Clay* followed the majority rule from the Circuits that *§2255* is interpreted to mean that "[A] judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction." *Clay, 123 S. Ct. at 1075.* However, that case involved the issue of when the limitations began to run on a *federal* conviction, not a state collateral attack. And, although that decision states that "the Courts of Appeals have uniformly interpreted 'direct review' in *§ 2244(d)(1)(A)* to

encompass review of a state conviction by this Court," *id. at 1077 n.3*, it never takes up the issue we are facing, the interpretation of *§ 2244(d)(2)*.

Therefore, I would continue to follow *Isham* in finding that "the denial of state post-conviction relief becomes final. . . after a decision by the state's highest court," *id. at 695*, and I would reverse the judgment of the district court finding Abela's habeas corpus petition [**30] was timely filed.

KEVIN MARK ABELA,
Petitioner-Appellant,
v.
WILLIAM MARTIN,
Director, Michigan
Department of Corrections,
Respondent-Appellee.

No. 00-2430

UNITED STATES COURT
OF APPEALS FOR THE
SIXTH CIRCUIT

309 F.3d 338; 2002 U.S.
App. LEXIS 22551; 2002
FED App. 0376P (6th Cir.)

July 30, 2002, Argued
October 30, 2002, Decided
October 30, 2002, Filed

COUNSEL: ARGUED: James Sterling Lawrence, Detroit, Michigan, for Appellant.

Raina I. Korbakis, OFFICE OF THE ATTORNEY GENERAL, HABEAS CORPUS DIVISION, Lansing, Michigan, for Appellee.

ON BRIEF: James Sterling Lawrence, Detroit, Michigan, for Appellant.

William C. Campbell, OFFICE OF THE ATTORNEY GENERAL, HABEAS CORPUS DIVISION, Lansing, Michigan, for Appellee.

JUDGES: Before: SILER, COLE, and CLAY, Circuit Judges.

OPINIONBY: COLE

OPINION: [***2] [*339]

R. GUY COLE, JR., Circuit Judge. This action arises from a state manslaughter conviction and a subsequent petition for the issuance of a writ of habeas corpus pursuant to *28 U.S.C. § 2254*. The district court denied the habeas petition on its merits, and Petitioner-Appellant Kevin Mark Abela has appealed. Abela argues that his habeas petition was timely filed and not procedurally defaulted. For that reason, he urges us to reverse the judgment of the district court and grant his petition on the grounds that his Fifth Amendment rights were violated by his post-arrest interrogation [**2] and the admission of statements from that interrogation at trial, because of prosecutorial conduct at [*340] trial, and because of ineffective assistance of trial and appellate counsel.

Although several issues were raised in this appeal, we need address only two: (1) whether Abela's habeas petition is moot and thus not within our Article III jurisdiction; and (2) whether Abela's habeas petition is barred by the statute of limitations set forth in *28 U.S.C. § 2244*(d)(1). Because Abela's § 2254 habeas petition is barred by the statute of limitations set forth in *28 U.S.C. § 2244*(d)(1), we do not address the procedural default issue or the remainder of Abela's claims on the merits. Accordingly, we **AFFIRM** the judgment of the district court in denying Abela's § 2254 habeas petition because such petition was filed outside the applicable statute of limitations. [***3]

BACKGROUND

A. Factual Background

Abela's underlying conviction stems from the stabbing death of Stanley Underwood at a party in the early morning hours of May 19, 1990. Abela arrived at a party at the home of Allen Howard in Rochester Hills, Michigan, sometime [**3] during the evening of May 18. At approximately 1 a.m. on May 19, Abela and a friend noticed a man, Jacob Sullivan, pushing a car out of the driveway of the home. Abela confronted Sullivan and an argument ensued, which then erupted into a fistfight. After the fight broke up, Sullivan ran into the house to tell his older brother, Jerry, that someone had beaten him up.

A second fight began when Jerry Sullivan and Howard ran outside to confront Abela. Abela's nose was broken in the fight, which ended with Howard holding Abela down on the ground. Howard promised Abela that he would release him if he left the party immediately. Abela then left the party with his friend Ronald Wright.

Upon reaching the car, Wright realized he had forgotten his jacket and returned to retrieve it. Abela was waiting for Wright at the edge of the driveway when he was attacked by several guests from the party. Abela was knocked to the ground and surrounded by several assailants, who kicked and punched him about the face and body. Among this group of attackers was Stanley Underwood, who, during the course of the brawl, straddled Abela's chest. Abela thereupon drew a knife from a sheath on his belt and stabbed [**4] Underwood in the chest and left arm three times. Underwood died shortly afterwards.

Abela fled to a friend's house, where he called 911 and admitted to the operator that he had stabbed someone. After meeting the police at Howard's house, Abela was taken to a hospital emergency room for treatment. While at the emergency room, but before

being treated for his injuries, Oakland County Police Sergeant Michael McCabe questioned [***4] Abela about the events leading up to the stabbing. Abela responded by stating, "Maybe I should talk to an attorney by the name of William Evans," and handed Sergeant McCabe Evans's business card. Sergeant McCabe promised Abela that he would contact Evans, and left the room. Upon returning, McCabe made no mention of the fact that he had been unable to contact Evans, and proceeded to read Abela his *Miranda* rights. Abela signed a waiver form indicating that he had been informed of his *Miranda* rights and began giving a statement to Sergeant McCabe -- beginning with the phrase, "I'll tell you everything." It does not appear that Sergeant McCabe took any steps toward contacting Evans before taking Abela's statement. [*341]

Abela gave a second statement to [**5] the police after his release from the hospital. In both statements, Abela admitted to stabbing Underwood, but claimed that he had done so in self-defense.

B. Procedural History

Abela was charged with second degree murder and carrying a concealed weapon in the stabbing death of Underwood. Before trial in the Oakland County Circuit Court, Abela's counsel sought dismissal of the weapons charge because the knife was not concealed -- it was carried in a sheath attached to the outside of Abela's belt. The trial judge granted that motion on September 12, 1990. On November 5, 1990, the prosecution filed a motion -- outside the applicable 14-day time limit -- seeking reconsideration of the dismissal. Mich. Ct. R. 2.119(F)(1). Abela's counsel did not object to this motion. On June 3, 1991, the judge granted the motion for reconsideration and reinstated the weapons charge.

The trial commenced in June 1991. During closing arguments, the prosecutor referred to a conversation

between Abela and co-defendant Ronald Wright, a conversation that does not appear anywhere in the trial record. The prosecutor stated: [***5]

> Do you think when they got back to that car they were mad as [**6] hell? Both of them got shot down, pretty damn drunk, they are pretty pissed off. They've lost the fight. They've been thrown out. They've been humiliated. They've been embarrassed.
>
> Not only that, Ron Wright says, "My damn coat's back there. Let's go get it." [Abela then replied,] "Ronnie, better take this [Abela's knife] when we go back. Ain't nobody going to kick our ass anymore. Let's go back."

Abela was convicted by a jury of voluntary manslaughter and carrying a concealed weapon on July 24, 1991. He was sentenced to a term of seven to fifteen years for voluntary manslaughter, and a concurrent forty months to five years of incarceration for carrying a concealed weapon.

Abela appealed his conviction by raising three issues in the Michigan Court of Appeals on February 17, 1992. The three issues were: (a) that his sentence was disproportionate to the crime; (b) that the trial court erred by reinstating the weapons charge; and (c) that the trial court erred by allowing the prosecution to present rebuttal testimony not raised in its case in chief. The Michigan Court of Appeals affirmed Abela's conviction and sentence in an unpublished disposition. [**7] *People v. Abela*, No. 144005 (Mich. Ct. App. July 22, 1994). The Michigan Supreme Court denied Abela's delayed application for leave to appeal these issues on March 31, 1995. *People v. Abela, 448 Mich. 900, 448*

Mich. 901, 533 N.W.2d 313, 1995 Mich. LEXIS 312 (Mich. 1995).

On August 20, 1996, n1 Abela filed a motion for relief from judgment in the Oakland County Circuit Court, raising six claims: (a) Abela's statement at the hospital was involuntary because Sergeant McCabe ignored Abela's request for an attorney; (b) Abela's statement at the hospital [*342] was involuntary because he was injured and under the influence of alcohol and pain medication; (c) the trial court improperly granted the prosecution's untimely motion to reconsider the dismissal of the concealed weapon charge; (d) the prosecutor unfairly prejudiced Abela by presenting witness testimony in his closing argument that was unsupported by the record; (e) Abela's trial counsel provided ineffective assistance; and (f) Abela's appellate counsel provided ineffective assistance. The motion was denied "for lack of merit on the grounds presented." *People v. Abela*, No. 90-101083 (Oakland County Cir. Ct. Oct. 22, 1996). Abela raised the same six issues on appeal to the Michigan Court of Appeals, [**8] which also denied leave to appeal and a motion to remand. *People v. Abela*, No. 200930 (Mich. Ct. App. July 22, 1997). On August 9, 1997, Abela again raised these six issues in his delayed application for leave to appeal to the Michigan Supreme Court, which likewise denied his petition. *People v. Abela, 457 Mich. 880, 586 N.W.2d 923, 1998 Mich. LEXIS 1190,* (Mich. 1998). On August 3, 1998, Abela filed a petition for certiorari with the United States Supreme Court, which was denied on October 19, 1998. *Abela v. Michigan, 525 U.S. 948, 142 L. Ed. 2d 309, 119 S. Ct. 374 (1998).*

n1 Abela claims in his brief that he filed his Motion for Relief from Judgment with the state

> court on April 14, 1996, rather than August 20, 1996. *See* Appellant's Brief at 11 n.1. The district court relied on the August 20, 1996 date in its calculations of whether Abela complies with the one-year statute of limitations under § 2244(d)(1). Using the April 14, 1996 date would provide Abela an additional five months of tolling of the statute of limitations -- crucial in this case. However, there is no support for Abela's claim of this April 14, 1996 date of filing. The state court docket sheet lists the filing date for this motion as August 20, 1996. The date stamp on the motion itself is August 20, 1996.

[**9]

Abela was released to parole status on March 16, 1998, and discharged from parole on March 16, 2000 -- terminating his seven to fifteen year sentence for manslaughter. Abela's three [***7] to five year sentence for carrying a concealed weapon ended on October 22, 1995.

On April 26, 1999, before his parole term had ended, Abela sought a writ of habeas corpus pursuant to § 2254, raising the same claims as in his motion for relief from judgment (except for his claim regarding the trial court's decision to reconsider its dismissal of the concealed weapon charge). The district court issued a memorandum opinion and denied the petition for habeas relief on October 31, 2000. On December 28, 2000, the district court denied Abela's motion for a certificate of appealability.

Abela appealed his denial of the motion to this Court. We granted his certificate of appealability on the issues before us on April 20, 2001.

DISCUSSION

1. Standard of Review

In an appeal of a district court's decision denying habeas relief under *28 U.S.C. § 2254,* this Court's review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), [**10] Pub. L. No. 104-32, 110 Stat. 1214 (1996). Under AEDPA, habeas relief may not be granted with respect to any claim adjudicated on the merits in state court unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

In *Williams v. Taylor, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000),* the Supreme Court determined that a state court's decision is contrary to clearly established federal law where it fails to consider a rule of law that is embedded in the Court's jurisprudence at the time the state conviction became final. *See id. at 380.* In defining "clearly established law," the Court held that "rules of law are sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather [*343] than as a bright-line rule." *Id. at 382.* [**11] Comparatively, a rule established following a petitioner's conviction "that 'breaks new ground or imposes a new obligation on the States or the Federal Government'" is not considered to be clearly established for the purposes of

this section. *Id. at 381* (quoting *Teague v. Lane, 489 U.S. 288, 301, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989)).* The *Williams* Court further held that a state court unreasonably applies clearly established Supreme Court precedent when it correctly identifies the governing legal principle in the case, yet unreasonably applies that principle to the facts of the defendant's case. *529 U.S. 362, 146 L. Ed. 2d 389, 413, 120 S. Ct. 1495.* A state court is considered to have unreasonably applied Supreme Court precedent when it "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *529 U.S. 362, 146 L. Ed. 2d 389, 407, 120 S. Ct. 1495.*

This Court must presume that all determinations of factual issues made by the state court are correct unless the petitioner can rebut that presumption by clear and convincing evidence. *See 28 U.S.C. § 2254*(e)(1) [**12] .

We examine Abela's claims under these parameters.

2. Analysis

A. Whether Abela's habeas petition is within our Article III jurisdiction.

We note that subject matter jurisdiction over this matter is conferred by *28 U.S.C. § 2254*(a) because Abela was "in custody" at the time he filed his habeas petition with the district court. *See 28 U.S.C. § § 2241* (c)(3), 2254(a). [***9] *28 U.S.C. § § 2241*(c)(3) and 2254(a) require that a § 2254 habeas petition be filed when a person is "in custody in violation of the Constitution or laws or treaties of the United States." An incarcerated convict's challenge to the validity of his conviction satisfies the "in custody" requirement of *28 U.S.C. § § 2241*(c)(3) and 2254(a). *Spencer v.*

Kemna, 523 U.S. 1, 7, 140 L. Ed. 2d 43, 118 S. Ct. 978 (1998). A prisoner who is placed on parole likewise satisfies this requirement because his release is not unconditional -- the parolee is required to report regularly to his parole officer, remain at a given job, residence, and community, and refrain from certain activities. *Jones v. Cunningham, 371 U.S. 236, 242, 9 L. Ed. 2d 285, 83 S. Ct. 373 (1963);* [**13] *see also Maleng v. Cook, 490 U.S. 488, 491, 104 L. Ed. 2d 540, 109 S. Ct. 1923 (1989)* (per curiam).

Although subject matter jurisdiction is appropriate in this case, this Court must consider whether Abela's release from custody and the subsequent conclusion of his parole term render his appeal moot under Article III, § 2 of the United States Constitution. Where no actual case or controversy exists between the parties, or when "'events occur during the pendency of a litigation which render the court unable to grant the requested relief,'" then the case is moot and outside our jurisdiction. *Speer v. City of Oregon, 847 F.2d 310, 311 (6th Cir. 1988)* (quoting *Carras v. Williams, 807 F.2d 1286, 1289 (6th Cir. 1986)).* Because mootness is a jurisdictional issue, we may raise it *sua sponte* on appeal even though the issue was neither raised nor briefed below. *Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718, 721 (6th Cir. 1993).*

As long as a petitioner files a habeas petition attacking his underlying criminal conviction while incarcerated or in custody, even where he is later released before the petition is considered, [**14] he will satisfy the [*344] case or controversy requirement of Article III because of the continuing collateral consequences to a wrongful criminal conviction. *Spencer, 523 U.S. at 8* (citing *Sibron v. New York, 392 U.S. 40, 55-56, 20 L. Ed. 2d 917, 88 S. Ct. 1889, 44 Ohio Op. 2d 402 (1968)).* These collateral

consequences to a criminal conviction include an inability to enter certain businesses, to serve as an elected official or juror, or to vote. *See Carafas v. La Vallee, 391 U.S. 234, 237-238, 20 L. Ed. 2d 554, 88 S. Ct. 1556 (1968).* [***10]

Abela's habeas petition, filed while on parole, attacks his underlying criminal conviction. Because Abela was on parole when his habeas petition was filed, he meets the "in custody" requirements of § § 2241(c)(3) and 2254(a). *See Maleng, 490 U.S. at 491.* Because he is challenging his underlying criminal conviction, the collateral consequences of that conviction provide Abela the personal stake in the outcome of the lawsuit he needs to satisfy Article III's case or controversy requirement. *Spencer, 523 U.S. at 7.* With subject matter jurisdiction and an actual case or controversy before us, Abela's case is not moot and [**15] therefore is within our jurisdiction. *Speer, 847 F.2d at 311.*

B. Whether Abela's habeas petition is barred by the statute of limitations set forth in *28 U.S.C. § 2244*(d)(1).

Abela argues that the statute of limitations in *28 U.S.C. § 2244*(d)(1) does not bar his habeas petition. The district court found that the statute of limitations did not bar Abela's habeas petition, in part because the statute of limitations period was tolled under the language of § 2244(d)(2) while Abela applied for certiorari to the United States Supreme Court following the denial of state post-conviction collateral review by the Michigan Supreme Court. Section 2244(d)(1) provides for a one-year statute of limitation for habeas claims after the date on which the judgment became final by the conclusion of direct review. A one-year grace period after the April 24, 1996, enactment of AEDPA is permitted if the judgment became final

before the passage of AEDPA. *See Austin v. Mitchell, 200 F.3d 391, 393 (6th Cir. 1999).* Section 2244(d)(2) provides that the time during which a "properly filed application for State post-conviction [**16] or other collateral review with respect to the pertinent judgment or claim is pending" will not count against this one-year limit. Accordingly, the issue before us is whether the § 2244(d)(1) statute of limitations period is to be tolled during: (a) the time between a lower state court's decision and the filing of a notice of appeal to a higher state court on collateral review of a petitioner's claims; and (b) the period in which the United [***11] States Supreme Court considers a petition for certiorari following the denial of collateral review at the state level.

Abela's direct appeal ended on March 31, 1995, when the Michigan Supreme Court denied Abela's motion for relief from judgment. Because Abela's claim became final before the passage of AEDPA, the § 2244(d)(1) one-year statute of limitations period for the filing of a § 2254 habeas petition began to run on April 24, 1996. On August 20, 1996, after the one-year statute of limitations period had run for 118 days, Abela filed his motion for relief from judgment and the § 2244(d)(2) tolling provision stayed the limitations period. The one-year statute of limitations period began running again on May 28, 1998, when the [**17] Michigan Supreme Court denied leave on Abela's motion for relief from judgment after his appeal through the state collateral review system. *See* § 2244(d)(2). The one-year statute of limitations ran for an additional 333 days until Abela filed this habeas petition on April 26, 1999. Taking the entire elapsed time (118 [*345] days from the period April 24, 1996 to August 20, 1996, plus 333 days from the period May 28, 1998 to April 26, 1999) amounts to 451 days of untolled time after Abela's conviction became final --

well outside the one-year statute of limitations provided by AEDPA. For that reason, we dismiss Abela's § 2254 habeas petition as untimely.

C. Elements of this tolling calculation

Uncontested by the parties is the 118 days of untolled time between April 24, 1996, when AEDPA was enacted, and August 20, 1996, when Abela filed his motion for relief from judgment. *See Austin, 200 F.3d at 393; 28 U.S.C. § 2244*(d)(2). However, the parties do contest the calculation of the final 333 days of untolled time following the Michigan Supreme Court's May 28, 1998, denial of Abela's motion for relief from judgment after his appeals through [**18] the state collateral review system. The Respondent argues that more than 333 days of untolled time had passed because the time between the lower state court's decision and the filing of a notice of appeal to the higher state court on collateral review [***12] of Abela's claims should qualify as untolled time. Abela argues that less than 333 days of untolled time had passed because the language of § 2244(d)(2) provides for additional tolling until October 19, 1998, when the United States Supreme Court denied his petition for certiorari from the Michigan Supreme Court's denial of leave. Under the language of § 2244(d)(2), we reject both of these contentions.

1. Tolling during the time between a lower state court's decision and the filing of a notice of appeal to a higher state court on collateral review of a petitioner's claims.

The statutory language of *28 U.S.C. § 2244* is ambiguous as to whether the one-year limitations period should be tolled during the time between a lower state court's decision and the filing of a notice of appeal to a higher state court on collateral review of a petitioner's claims. The relevant section states:

> The [**19] time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). The tolling in the intervals between each level of state court collateral review turns on the definition of the word "pending" in § 2244(d)(2). The United States Supreme Court recently clarified this issue, noting that a petitioner's claim is "pending" for the entire term of state court review -- including those intervals between one state court's judgment and the filing of an appeal with a higher state court. *Carey v. Saffold, 536 U.S. 214, 153 L. Ed. 2d 260, 122 S. Ct. 2134, 2138 (2002).* As the district court pointed out, Abela timely filed his application for collateral review at each stage of the appellate process, and thus meets the "properly filed" and "pending" language of § 2244(d)(2). [***13]

2. Tolling for the certiorari period for United States Supreme Court review of Abela's state post-conviction collateral review petition.

The remaining issue before us is whether § [**20] 2244(d)(2) provides for tolling of the one-year statute of limitations period in § 2244(d)(1) for the period of time in which a petitioner seeks certiorari review by the United States Supreme Court following the denial of post-conviction collateral relief by the State. This is of particular importance here, as the timeliness of Abela's petition turns on this very issue. [*346] If § 2244(d)(2) cannot be read to toll the statute of limitations period while a petitioner seeks review from the United States Supreme Court, then § 2244(d)(1) cannot be tolled for the 116 days in which Abela filed

and received a petition for certiorari, thus rendering his petition untimely by 86 days. Likewise, if § 2244(d)(2) can be read to permit tolling for this period of time, Abela accumulates 189 days from when the United States Supreme Court denied certiorari to when the petition for habeas corpus was filed. This results in a total of 335 days of untolled time from the date Abela's conviction became final to the date he filed his petition for habeas corpus, thus satisfying the one-year § 2244(d)(1) statute of limitations.

Section 2244(d)(2) allows for tolling of the time associated with the filing of [**21] an "application for State post-conviction or other collateral review." Abela argues that a petition for certiorari with the United States Supreme Court following the denial of state post-conviction collateral relief constitutes "other collateral review" and thus permissibly tolls the one-year § 2244(d)(1) statute of limitations. *See, e.g., Duncan v. Walker, 533 U.S. 167, 177, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001)* (parsing but not deciding the limits of, and overlap between, "State post-conviction review" and "other collateral review"). This Court must first determine, then, whether the word "State" modifies both "post-conviction" and "other collateral review." The recent United States Supreme Court decision in *Duncan, 533 U.S. at 173,* indicates that it does. After an extensive analysis of congressional intent and principles of statutory construction, [***14] *Duncan* concluded that in the operative tolling phrase of § 2244(d)(2), "State post-conviction or other collateral review," "State" modifies both "post-conviction" and "other collateral review." *533 U.S. at 174; see also Isham v. Randle, 226 F.3d 691, 695 (6th Cir. 2000),* [**22] *cert. denied, 531 U.S. 1201, 149 L. Ed. 2d 124, 121 S. Ct. 1211 (2001).* With the addition of the "State" modifier, the § 2254(d)(2) language of "other collateral review" forms "other state collateral review." *See Duncan, 533*

U.S. at 175. Thus, § 2244(d)(2) permits tolling only for "State post-conviction," or "other state collateral review." *Id. at 181-82* (concluding federal habeas review does not toll § 2244(d)(1) statute of limitations because it is not "State post-conviction or other collateral review" under § 2244(d)(2)).

Given that § 2244(d)(1) can only be tolled for "State post-conviction," or "other state collateral review," we must now consider whether a petition for certiorari to the United States Supreme Court following the denial of state post-conviction collateral relief can be considered as such. The holding in *Isham, 226 F.3d at 695,* answers this question in the negative. There, this Court found that,

> A petition for certiorari to the United States Supreme Court is not "state post conviction relief." Neither is such a petition "other state collateral relief." As the Tenth Circuit observed [**23] in *Rhine v. Boone, [182 F.3d 1153, 1156,]* a petition for a writ of certiorari to the United States Supreme Court is "simply not an application for state review of any kind . . . ."

Isham, 226 F.3d at 695.

Because *Duncan* mandates that § 2244(d)(2) permits tolling only for the time associated with "State post-conviction," or "other state collateral review," and because our holding in *Isham* precludes us from considering a petition for certiorari to the United States Supreme Court as "State post-conviction," or "other state collateral review," we cannot read [***15] § 2244(d)(2) to permit tolling here. No [*347] other avenues are left for tolling in the statute. n2

n2 At oral argument, Petitioner cited two cases from the Third Circuit that he claimed allowed for tolling when a petition for certiorari is filed with the United States Supreme Court following state post-conviction collateral review. The first, *Nara v. Frank, 264 F.3d 310 (3d Cir. 2001),* involves a situation where the defendant did not file a petition for certiorari with the United States Supreme Court following the termination of his state post-conviction collateral review process. In fact, the court specifically excluded from tolling under § 2244(d)(2) the ninety-day period following the denial of state post-conviction collateral review, and made no comment on the status of tolling when a petition is filed. *264 F.3d at 318.* In the second case, *Morris v. Horn, 187 F.3d 333 (3d Cir. 1999),* the Third Circuit found that § 2244(d)(2) tolled the one-year statute of limitations period under § 2244(d)(1)(A) from the date upon which the petitioner first filed his petition for state post-conviction relief until the date on which the United States Supreme Court denied certiorari review of that petition. *187 F.3d at 333-37.* We note that *Morris* was decided without the benefit of the Supreme Court's decision in *Duncan.* While *Nara* and *Morris* are instructive, we are still bound by *Isham*, which excludes United States Supreme Court review of state post-conviction collateral review from tollable time under § 2244(d)(2). *Isham, 226 F.3d at 695.*

[**24]

Most of the circuits that have addressed this issue also have held that state post-conviction collateral review is complete once the state's highest court has ruled. *See Coates v. Byrd, 211 F.3d 1225, 1227 (11th*

Cir. 2000), cert. denied, 531 U.S. 1166, 148 L. Ed. 2d 995, 121 S. Ct. 1129 (2001) ("An application 'for State post-conviction or other collateral review . . . is pending,' [under] *28 U.S.C. § 2244*(d)(2), only so long as the case is in the state courts."); *Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir. 1999), cert. denied, 528 U.S. 1084, 145 L. Ed. 2d 681, 120 S. Ct. 808 (2000)* ("The time after the Oklahoma Court of Criminal Appeals finally denied his post-conviction application until the United States Supreme Court denied his petition for certiorari was not 'time during which a properly filed application for State post-conviction . . . review . . . [was] pending.'"); *Ott v. Johnson, 192 F.3d 510, 513 (5th Cir. 1999), cert. denied, 529 U.S. 1099, 146 L. Ed. 2d 777, 120 S. Ct. 1834 (2000)* ("[Section] 2244(d)(2) does not toll the limitations period [**25] from the time of denial of state habeas relief by the state high court until the [***16] time in which a petitioner could have petitioned the United States Supreme Court for certiorari."); *cf. Gutierrez v. Schomig, 233 F.3d 490, 492 (7th Cir. 2000), cert. denied, 532 U.S. 950, 149 L. Ed. 2d 361, 121 S. Ct. 1421 (2001)* (deciding not to toll for the ninety-day period in which a litigant potentially could have filed a petition for certiorari with the United States Supreme Court using the "properly filed application . . . [that] is pending" language of § 2254(d)(2), and specifically reserving for later the question of whether a petition for certiorari that has been filed with the United States Supreme Court falls within the statutory language of § 2254(d)(2)).

While allowing tolling for Supreme Court review in this circumstance would better effectuate the incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts, we are foreclosed from reaching this result under the authority of *Duncan* and *Isham*. As such, we hold that tolling of

the one-year statute of limitations period in § 2244(d)(1) [**26] for "State post-conviction or other collateral review" in § 2244(d)(2) does not extend to the period in which the United States Supreme Court considers a petition for certiorari following the state collateral review process. Thus, Abela's statute of limitations period began running immediately following the final denial of his state post-conviction review by the Michigan Supreme Court on May 28, [*348] 1998. *See* § 2244(d)(2). Abela's § 2254 habeas petition is untimely because 451 days of untolled time passed between the date his conviction became final and the filing of his § 2254 petition. This is beyond the one-year statute of limitations period required by AEDPA and § 2244.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court in denying Abela's § 2254 habeas petition because such petition was filed outside the applicable statute of limitations. Because Abela's § 2254 petition for habeas corpus is outside the one-year statute of limitations period in *28 U.S.C. § 2244*(d)(1), we need not consider the procedural default issue or the remainder of Abela's claims on the merits.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN MARK ABELA,

Petitioner,

Case Number: 99-72095

v.

WILLIAM MARTIN,

Respondent.

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Petitioner Kevin Mark Abela, through his counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently released on parole in Wayne County, Michigan. For the reasons set forth below, the court denies the petition.

II. Facts

Petitioner s conviction arises out of the stabbing death of Stanley Underwood. On the evening of May 18, 1990, Petitioner went to a party at the house of Al Howard in Rochester Hills, Michigan. At approximately 1:00 a.m. on May 19, 1990, Petitioner and a friend, Ron Wright, left the Rochester Hills party to visit some friends in Pontiac, Michigan. Petitioner

and Wright returned to the Rochester Hills party shortly thereafter. As they were driving up to Al Howard's home, they saw J.J. Sullivan ("J.J.") attempting to push a car out of the house's driveway. Petitioner cautioned J.J. that he was going to damage the car. Petitioner and J.J. then began arguing and eventually got into a fistfight. At some point, the two men stopped fighting and J.J. ran into the house.

When J.J. ran into the house he told his older brother, Jerry Sullivan ("Jerry"), that someone had beaten him up. Jerry and Al Howard then ran outside to confront Petitioner and Wright. The four men began fighting. The fight ended when Al Howard, who was holding Petitioner down on the ground, told Petitioner he would release Petitioner if Petitioner would leave the party. Petitioner and Wright then left the party and got into their car.

When they got into their car, Wright realized that he had left his leather jacket at the party. Wright decided to return for his jacket. While Wright went into the house to retrieve his jacket, Petitioner stood at the edge of the driveway. Suddenly, several people from the party, including Stanley Underwood, attacked him and he was knocked to the ground. Stanley Underwood was on top of Petitioner while he was lying on the ground. Petitioner drew a knife, which he used at work, from a sheath on his belt and stabbed Underwood several times. Underwood died as a result of stab wounds to the upper left chest and upper left arm.

Petitioner fled to a friend's house, where he called police. The police took Petitioner to a local hospital where he was treated for a broken nose and multiple cuts and abrasions.

Petitioner gave two statements to police in which he claimed he acted in self defense. The first statement was given at the hospital After being treated at the hospital, Petitioner was taken to the police station where he gave another statement to police. The second statement was tape recorded.

III. Procedural History

Following a jury trial in Oakland County Circuit Court, Petitioner was convicted of voluntary manslaughter and carrying a concealed weapon. On July 29, 1991, Petitioner was sentenced to seven to fifteen years imprisonment for the manslaughter conviction and three years, four months to five years imprisonment for the carrying a concealed weapon conviction.

Petitioner filed an appeal of right in the Michigan Court of Appeals presenting the following claims:

I. Abela's sentence of seven to fifteen years for manslaughter violates the principle of proportionality expressed in People v. Milbourn, 435 Mich. 630 (1990)

II. The trial court reversibly erred in granting the prosecution's motion for rehearing on its decision to quash the carrying a concealed weapon charge.

III. The trial court committed error requiring reversal when it allowed the prosecution to introduce rebuttal testimony which could have been presented in its case-in-chief.

The Michigan Court of Appeals affirmed

Petitioner's conviction and sentence. People v. Abela, No. 144005 (Mich. Ct. Apr. July 24, 1994).

Petitioner then filed a delayed application for leave to appeal in the Michigan Supreme Court, presenting the same claims presented to the Michigan Court of Appeals. On March 31, 1995, the Michigan Supreme Court denied leave to appeal. People v. Abela, No. 100783 (Mich. March 31, 1995).

On August 14, 1996, Petitioner filed a motion for relief from judgment in the trial court, presenting the following claims:

I. Defendant's statement to police was involuntary and inadmissible where the police admitted that when they began questioning, defendant requested an attorney.

II. Defendant's statement to police was involuntary and inadmissible where defendant was seriously injured and under the influence of alcohol and pain medication given to him by the doctor.

III. The court improperly granted an untimely motion to reconsider the ruling dismissing the CCW charge.

IV. The prosecutor unfairly prejudiced defendant by making up facts in hisargument.

V. Trial counsel was ineffective.

VI. Appellate counsel was ineffective, particularly where he did not order a

> relevant transcript, and there was "good cause" for not raising these issues in the appeal of right.

In a form order, the Oakland County Circuit Court denied Petitioner's motion "for lack of merit on the grounds presented." People v. Abela, No. 90-101083 (Oakland County Circuit Ct. Oct. 22, 1996)

Petitioner then filed a delayed application for leave to appeal in the Michigan Court of Appeals, presenting the same issues presented in his motion for relief from judgment, and a motion to remand to the trial court for evidentiary hearings and an explanation of the trial judge's ruling denying the motion for relief from judgment. On July 22, 1997, the Michigan Court of Appeals denied leave to appeal and denied Petitioner's motion to remand. People v. Abela, No. 200930 (Mich. Ct. App. July 22, 1997).

Thereafter, Petitioner filed a delayed application for leave to appeal to the Michigan Supreme Court, which was also denied. People v. Abela, No. 110260 (Mich. May 28, 1998).

On April 26 1999, Petitioner, through counsel, filed the for a writ of habeas corpus, presenting the same claims presented in his motion for relief from judgment with the exception of the claim regarding the trial court's decision to reconsider its dismissal of the carrying of a concealed weapon charge.

On October 25, 1999, Respondent filed a motion to dismiss the petition for a writ of habeas corpus on the ground that it was untimely. On December 13, 1999, this court issued an Opinion and Order Denying Respondent's Notion to Dismiss and requiring a responsive pleading.

IV. Analysis

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA") altered the standard of review federal courts must apply when reviewing applications for a writ of habeas corpus. The AEDPA applies to all habeas petitions filed after the effective date of the act, April 24, 1996. Because petitioner's application was filed after April 24, 1996, the provisions of the AEDPA, including the amended standard of review, apply to this case.

As amended, 28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998). Additionally, this court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1)[1], see also Cremeans v Chapleau, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous").

> The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:
>
> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. .
>
> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result

[1] 28 U.S.C. § 2254(e) (1) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

different from [the Court's] precedent.

Williams v. Taylor, 120 5. Ct. 1495, 1519-20 (2000)

With respect to the "unreasonable application" clause of §2254(d) (1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." Id. at 1521. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable.
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . Under § 2254(d) (1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.
>
> Rather, that application must also be unreasonable.

Id. at 1521-22.

With this standard in mind, the court proceeds to the merits the petition for a writ of habeas corpus.

B. Procedural Default

Respondent argues that Petitioner's claims are barred from review in this court because they are procedurally defaulted. The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if the state prisoner files an untimely appeal, Coleman, 501 U.S. at 750, if he fails to present an issue to a state appellate court at his only opportunity to do so, Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994), or if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g. to make a contemporaneous objection, or file a motion for a directed verdict. United States v. Frady, 456 U.S. 152, 167-69 (1982); Simpson v. Sparkman, 94 F.3d 199, 202 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." Rust, 17 F.3d at 162; Murray v. Carrier, 477 U.S. 478, 496 (1986).

For the doctrine of procedural default to apply,

a firmly established state procedural rule applicable to the petitioner's claim must exist, and the petitioner must have failed to comply with that state procedural rule. Warner v United States, 975 F.2d 1207, 1213-14 (6th Cir. 1992). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. Coleman, 501 U.S. at 729-30. "When a state court judgment appears to have rested primarily on federal law or was interwoven with federal law, a state procedural rule is an independent and adequate state ground only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar " Simpson, 94 F.3d at 202.

If the last state court from which the petitioner sought review affirmed the conviction both on the merits, and, alternatively, on a procedural ground, the procedural default bar is invoked and the petitioner must establish cause and prejudice order for the federal court to review the petition. Rust, 17 F.3d at 161. If the last state court judgment contains no reasoning, but simply affirms the conviction in a standard order, the federal habeas court must look to the last reasoned state court judgment rejecting the federal claim and apply a presumption that later unexplained orders upholding the judgment or rejecting the same claim rested upon the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)

This court begins its analysis of whether Petitioner's claims are procedurally defaulted by looking to the last reasoned state court judgment denying Petitioner's claims. See Coleman, 501 U.S. at 729-30. Respondent claims that the last reasoned state court judgment is the Michigan Supreme Court's

decision denying Petitioner's delayed application for leave to appeal the trial court's denial of his motion for relief from judgment. Respondent argues that, based on that decision, Petitioner's claims are procedurally defaulted. (Respondent's Answer at 7-8.) The Michigan Supreme Court's decision, in its entirety, stated:

> On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under N.C.R. 6.508(D).

People v. Abela, No. 110260 (Mich. May 28, 1998).

Respondent's argument that the Michigan Supreme Court's reference to N.C.R. 6.508(D) constitutes procedural default is untenable. First, this conclusory denial of Petitioner's application for leave to appeal can hardly be considered a reasoned state court judgment to which this court would turn to determine whether procedural default is invoked. The Michigan Supreme Court's Order falls squarely within the ambit of a "standard order" which the United States Supreme Court directed federal courts to look past in favor of the last reasoned state court judgment. Ylst, 501 U.S. at 803.

> Second, Respondent rests its argument of procedural default on certain subsections of M.C.R. 6.508(D). The Michigan Supreme Court simply did not refer to any particular subsection of M.C.R. 6.508(D). M.C.R. 6.508(D) states, in pertinent part: "The defendant has the burden of establishing entitlement to the relief requested." The Michigan Supreme Court's reference to M.C.R. 6.508(D) in general and no subsection in particular, therefore, leads to the conclusion

> that the Michigan Supreme Court simply held that Petitioner was not entitled to relief. Such a holding certainly does not establish a procedural default.

This court therefore turns to the Michigan Court of Appeals' decision denying Petitioner's application for leave to appeal. The Michigan Court of Appeals denied leave to appeal "for lack of merit in the grounds presented." People v. Abela, No. 200930 (Mich. Ct. App. July 22, 1997). Thus, the Michigan Court of Appeals denied relief based on an analysis of the merits of Petitioner's claims, not based upon a procedural default. Accordingly, Petitioner's claims are not barred from review by this court by the doctrine of procedural default.

C. Voluntariness of Petitioner's Statement to Police

Petitioner arouses that he is entitled to habeas corpus relief because his statement to police was involuntary because he was questioned after allegedly invoking his right to counsel and when he was under the influence of alcohol and pain medication.

"Where a state court, although deciding a claim, does not offer some explanation of its decision, a federal court must conduct an independent review of the state court's decision. . . . This independent review requires the federal court to ' review the record and applicable law to determine whether the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented.'" Morse v. Trippett, 102 F. Supp. 2d 392, 402 (E.D. Mich. 2000) *(quoting* Harris v. Stovall,

Stovall, 212 F.3d 940, 943 (6th Cir. 2000).

In the pending case, the state court failed to offer any explanation of its decision denying Petitioner's claim that his statement to police was involuntary. Therefore, this court must conduct an independent review of Petitioner's claims. Id.

> First, Petitioner claims that he invoked his right to counsel prior to being questioned by police. Petitioner's counsel filed a motion to suppress his confession in the trial court. The trial court conducted a hearing on this motion during which Petitioner testified. During his testimony, Petitioner stated that Oakland County Police Sergeant Michael McCabe came to question him while he was in the hospital emergency room. Petitioner testified that he told Sergeant McCabe that because a serious offense was involved Petitioner ought to have his lawyer. Petitioner further testified that Sergeant McCabe then left Petitioner's hospital room. Sergeant McCabe returned a short while later and began asking Petitioner questions, which he answered.

Sergeant McCabe testified that Petitioner said, "[M]aybe I should talk to an attorney by the name of William Evans." (Tr., 5/1/91 at 19.) Sergeant McCabe offered to call Attorney Evans if Petitioner so desired. Sergeant McCabe then informed Petitioner of his Miranda rights. Petitioner signed a waiver form indicating that he had been informed of his Miranda rights. Sergeant McCabe testified that Petitioner then said, "I'll tell you everything." (Id. at 20.)

Petitioner's statements do not constitute an unequivocal request for counsel. The United States

Supreme Court has explained the invocation of the right to counsel as follows:

> Invocation of the Miranda right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney . . . . But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . . Rather, the suspect must unambiguously request counsel.

Davis v. United States, 512 U.S. 452, 458-59, 114 5. Ct. 2350, 129 L.Ed.2d 362 (1994)

Petitioner' s reference to the possibility that he should have an attorney because the situation before him was serious was, at best, an ambiguous reference to an attorney which did not require the cessation of questioning. See Davis, 512 U.S. at 461 (holding that defendant's statement that "maybe I should talk to a lawyer" was not an unambiguous request for counsel); Ledbetter v. Edwards, 35 F.3d 1062, 1070 (6th Cir. 1994) (finding that suspects statement that "it would be nice" to have an attorney was not an unambiguous request for counsel). Not only was Petitioner's ambiguous reference to counsel insufficient to require cessation of counsel, but Petitioner failed at any time thereafter to even mention an attorney which, had he done so, might have clarified his purported desire for

counsel. Moreover, shortly after mentioning his counsel and after being advised of his Miranda rights, Petitioner told Sergeant McCabe, "I'll tell you everything," thus, indicating his desire to give a statement to police and resolving any potential ambiguity inherent in his earlier reference to counsel as not having been an invocation of his right to counsel. Accordingly, Petitioner is not entitled to habeas corpus relief with respect to his claim that his statement was taken after he invoked the right to counsel.

Petitioner also alleges that his statement was involuntary because he was under the influence of alcohol and prescription medication at the time of questioning by police. When determining whether a statement is voluntary, the ultimate question is "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." Miller, 474 U.S. at 112.

Those circumstances include:

1. Police Coercion

2. Length of Interrogation

3. Location of Interrogation

4. Continuity of Interrogation

5. Suspect's Maturity

6. Suspect's Education

7. Suspect's Physical Condition and Mental Health

8. Whether Suspect Was Advised of Miranda Rights Withrow v. Williams, 507 U.S. 680, 693-94 (1993)

All of the factors surrounding the confession should be scrutinized closely. Culombe v. Connecticut, 367 U.S. 568 (1981). However, without coercive police activity, a confession should not be found to be involuntary. Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause"). A statement is considered to be the result of police coercion if: (1) the police extorted the statement by means of coercive activity; (2) the coercion in question was sufficient to overbear the will of the accused; and (3) the will of the accused was in fact overborne "because of the coercive police activity in question." McCall v. Dutton, 863 F.2d 454, 459 (6th Cir. 1988)

The Supreme Court has held that "Miranda protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." Connelly, 479 U.S. at 170. Absent any coercive government activity, a confession cannot be found to be involuntary. Id. Moreover, a "defendant's intoxication, in the absence of any coercive police activity, does not make the confession involuntary." Marcum v Knight, 922 F.2d 841 (6th Cir. 1991)

Petitioner fails to establish that the police engaged in any coercive activity. Petitioner argues that because he was injured, tired, and had been drinking prior to police questioning, his statements to police were

coerced'. However, Petitioner was offered food and drink while being questioned, the questioning was short in duration, and, although Petitioner was in pain from his injuries, Petitioner did not testify that he was consequently unable to understand the officer's questions. In addition, the trial judge, upon denying the motion to suppress Petitioner's statements, observed that Petitioner sounded coherent in his tape-recorded statement.

Thus, in light of the totality of the circumstances, this Court holds that Petitioner's statement to police was not obtained in violation of his constitutional rights.

D. Prosecutorial Misconduct

Petitioner claims that he is entitled to habeas corpus relief because the prosecutor argued facts not in evidence in his closing statement. Specifically, Petitioner argues that the prosecutor invented a conversation between Petitioner and codefendant Ron Wright. The prosecutor stated that, prior to Wright's return to the Howard house for his jacket, Petitioner told Wright "[B]etter take this [knife] when we go back. Ain't nobody going to kick our ass anymore. Let's go back." (Tr., 6/21/91.) Petitioner argues that no testimony was offered to show that he made this statement.

"Prosecutorial misconduct may warrant habeas relief only if the relevant misstatements were so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process deprivation." Caldwell v. Russell, 181 F.3d 731, 736 (6th Cir. 1999). A determination of whether the trial was fundamentally unfair is "made by evaluating the

totality of the circumstances. Anpel v. Overbero, 682 F.2d 605 (6th Cir. 1982) The court must examine "'the fairness of the trial, not the culpability of the prosecutor.'" Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997), *(quoting* Serra v. Michipan Department of Corrections, 4 F.3d 1348, 1355 (6th Cir. 1993))

Considering the totality of the circumstances, the prosecutor's statement during closing argument did not render Petitioner's trial fundamentally unfair. During jury instructions, the trial court gave the following cautionary instruction:

> When you discuss the case and decide on your verdict, you can only consider the evidence that has been properly admitted in the case. Therefore, it is important that you understand what is evidence and what's not evidence.
>
> Evidence includes only the sworn testimony of the witnesses and of course any exhibits that have been admitted into evidence.
>
> Many things are not evidence. You should be careful not to consider them as such. I'll describe some of the things that are not evidence in a lawsuit. . . .
>
> . . . . The lawyers statements and arguments are not evidence.

(Tr., 6/21/91, at 130-31.)

Given the length of the trial and the relative brevity of the prosecutor's misstatement, the weight of the evidence against Petitioner, and the cautionary instruction given by the trial court, this court

determines that the prosecutor's misstatement did not render Petitioner's trial fundamentally unfair. Accordingly, Petitioner is not entitled to habeas corpus relief with respect to this claim.

E. Ineffective Assistance of Trial Counsel

Petitioner claims that his trial counsel rendered constitutionally ineffective assistance. Prior to trial, Petitioner's counsel filed a motion to dismiss the carrying a concealed weapon charge on the ground that the knife was carried in a sheath on Petitioner's belt and therefore not concealed. The trial court granted this motion on September 12, 1990. On November 5, 1990, the prosecutor filed a motion for reconsideration of the order granting the motion to dismiss. On December 12, 1990, the trial judge agreed to reconsider the motion. On June 3, 1991, the trial judge granted the prosecutor's request to reinstate the carrying a concealed weapon charge.

Petitioner asserts that, under Michigan Court Rule 2.119(F) (1), the motion for reconsideration was untimely and therefore should have been denied. Petitioner's counsel did not object to the motion for reconsideration as untimely. Petitioner argues that his attorney's failure to object to the motion as untimely constituted ineffective assistance of counsel because, Petitioner alleges, such an objection would have been granted.

In Strickland v Washinoton, 466 U.S. 668 (1984), the Supreme Court established a two-pronged test for determining whether a petitioner has received ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient, which "requires a showing that counsel made errors so serious

that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. Second, a petitioner must show that counsel's deficient performance prejudiced petitioner. A petitioner may establish orejudice by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial." Id.

The Supreme Court emphasized that, when considering an ineffective assistance of counsel claim, the reviewing court should afford counsel a great deal of deference:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 689 (internal citations omitted)

The Court further explained that, to establish deficient performance, a petitioner must identify acts that were "outside the wide range of professionally competent assistance." Id. To satisfy the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. The Sixth Circuit, applying the Strickland standard, has held that a reviewing court therefore must focus on whether counsel's alleged errors "have undermined the reliability of and confidence in the result." McQueen v. Scroggy, 99 F.3d 1302, 1311 (6th Cir. 1996)

In the instant case, Petitioner claims that his trial counsel was ineffective in failing to object to the prosecutor's untimely motion for reconsideration. Petitioner's argument rests on his claim that M.C.R. 2.119(F) mandates that a trial court *must* deny an untimely motion for reconsideration. That is, Petitioner argues that if his attorney had objected to the motion as being untimely, the trial court would have been compelled to deny the motion because, according to Petitioner, a trial court has no discretion to grant an untimely motion for reconsideration.

Petitioner's argument, however, is not supported by Michigan caselaw. In Bers v. Bers, 411 N.W.2d 732, 734 (Mich. Ct. App. 1987), the Michigan Court of Appeals explained the application of M.C.R. 2.119(F) as follows:

> The purpose of N.C.R. 2.119(F) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to

> correction on appeal, but at a much greater expense to the parties. . . . The time requirement for filing a motion for reconsideration or rehearing insures that the motion will be brought expeditiously. . If a trial court wants to give a second chance to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion. All this rule does is provide the trial court with some guidance on when it may wish to deny motions for rehearing.

Id. (internal quotations omitted)

Thus, it was within the trial court's discretion to grant the motion for reconsideration even though it was filed beyond the seven day period. Trial counsel did not render constitutionally ineffective assistance of counsel in failing to object to the timeliness of the motion for reconsideration where the trial court concluded that its prior decision to dismiss the carrying a concealed weapon charge was in error. The trial court wanted to "give a second chance to a motion it previously denied" and acted within its discretion in doing so. Id. Therefore, Petitioner has failed to establish that trial counsel erred or that he suffered any prejudice as a result of his counsel's failure to object to the timeliness of the motion when such an objection would not have succeeded.

F. Ineffective Assistance of Appellate Counsel

Finally, Petitioner claims that his appellate counsel was ineffective for failing to raise on appeal the claims that Petitioner's statements to police were involuntary and that the prosecutor engaged in misconduct. This

court has determined that Petitioner's statements to police were voluntary and that the prosecutor did not engage in misconduct. Appellate counsel's failure to raise these claims, where such claims are meritless, does not constitute error. Accordingly, Petitioner is not entitled to habeas corpus relief with respect to this claim.

V. Conclusion

For the foregoing reasons, **IT IS ORDERED** that the petition of the writ of habeas is DENIED and the matter is **DISMISSED WITH** PREJUDICE.

ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Date: 31 Oct 2000

KEVIN MARK ABELA
v.
MICHIGAN

98-327

SUPREME COURT OF THE UNITED STATES

525 U.S. 948; 119 S. Ct. 374; 142 L. Ed. 2d 309; 1998 U.S. LEXIS 6716; 67 U.S.L.W. 3270

October 19, 1998, Decided

JUDGES: [*1] Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: Petition for writ of certiorari to the Court of Appeals of Michigan denied.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v
KEVIN MARK ABELA,
Defendant-Appellant.

SC: 110260

SUPREME COURT OF MICHIGAN

457 Mich. 880; 586 N.W.2d 923; 1998 Mich. LEXIS 1190

May 28, 1998, Decided

OPINION:

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

Court of Appeals, State of Michigan

ORDER

Janet T. Neff
Presiding Judge
Joel P. Hoekstra
Donald P. Holbrook, Jr.
Judges

People of MI
v
Kevin Mark Abela

Docket #200930
L.C. # 90-101083 FC

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

The motion to remand is DENIED.

SEAL OF THE MICHIGAN SUPREME COURT

A true copy entered and certified by Ella Williams, Chief Clerk, on

July 22, 1997

/s/ (Ella Williams)
Chief Clerk

STATE OF MICHIGAN

IN THE OAKLAND COUNTY CIRCUIT COURT

Filed
October 23, 1996
Deputy County Clerk

THE PEOPLE OF THE STATE OF MICHIGAN,

V CR 90-101083-FC

KEVIN MARK ABELA,

Defendant

----------/

ORDER RE: POST-CONVICTION RELIEF

Defendant has filed a motion seeking post-conviction relief.

This Court has reviewed Defendant's pleadings and the applicable law.

Pursuant to MCR 2.119(E)(3), the Court dispensed with oral argument.

Defendant's motion is:

___ taken under advisement and the Court will issue a written opinion.

___ denied because Defendant has not followed proper procedure.

XXXXXXX denied foe lack of merit on the grounds presented.

___ granted

DATED: October 22, 1996

/s/
JOHN J. MCDONALD
CIRCUIT JUDGE

1995 MICH. LEXIS 312

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.
KEVIN MARK ABELA,
Defendant-Appellant.

SC: 100783

SUPREME COURT OF MICHIGAN

448 Mich. 900; 533 N.W.2d 313; 1995 Mich. LEXIS 312

March 31, 1995, Entered

JUDGES: James H. Brickley, Chief Justice, Charles L. Levin, Michael F. Cavanagh, Patricia J. Boyle, Dorothy Comstock Riley, Conrad L. Mallett, Jr., Elizabeth A. Weaver, Justices

OPINION: Order

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Weaver, J., not participating.

Order

Michigan Supreme Court

Entered: March 31, 1995 Lansing, Michigan

James H. Brickley
Chief Justice

100783

Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

SC: 100783
COA: 44005
LC:90-101083-FC

KEVIN MARK ABELA,

Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Weaver, J., not participating

20328

SEAL OF THE MICHIGAN SUPREME COURT

I, CORBIN DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 31, 1995

/s/

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KEVIN MARK ABELA,

Defendant-Appellant

UNPUBLISHED
July 22, 1994

No. 144005
LC No. 90-101083-FC

Before: Taylor, P.J., and Weaver and M.R. Smolenski,* JJ

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, and carrying a concealed weapon, MCL 750.227; MSA 28.424. Defendant was then sentenced to prison terms of seven to fifteen years and 3 ½ to five years, respectively. Defendant now appeals as of right. We affirm.

I

Defendant first asserts his sentences are unconstitutionally excessive. A sentence constitutes an abuse of discretion if it violates the principle of proportionality. People v Milbourn, 435 Mich 630; 461 NW2d 1 (1990). The sentences imposed fall within the

sentencing guidelines* recommendation and are therefore presumptively proportionate. People v Dukes, 189 Mich App 262; 471 NW2d 651 (1991). After a thorough review of the record, we find the sentence imposed is proportionate to the seriousness of the circumstances surrounding this offense and this offender. We find no abuse of the sentencing judge's discretion.

II

Defendant contends the evidence was insufficient to bind him over for the carrying a concealed weapons charge. Specifically, defendant claims the evidence did not establish that he was concealing the weapon, when it showed only that he was holding the knife in one hand behind his back.

A weapon is concealed when "it is not discernible by the ordinary observation of persons coming in contact with the person carrying it, casually observing him, as people do in the ordinary and usual associations of life." People v Kincade, 61 Mich App 498; 233 NW2d 54 (1975).

Both witnesses testified that they could not see, or know, what defendant was holding. Thus, we conclude that the court did not abuse its discretion in binding defendant over for the concealed weapon charge

III

Finally, the defendant asserts the court erred when it allowed the prosecution to introduce rebuttal

---

* Circuit judge, sitting on the Court of Appeals by assignment.

testimony which could have been presented in its case-in-chief. Defendant refers to an officer's testimony, offered in rebuttal to defendant's testimony, regarding defendant's statement about when he lost his glasses and where the victim was stabbed. Though we agree with defendant that this testimony was improperly introduced, People v Hernandez, 423 Mich 340; 377 NW2d (1985), we find the error was not so egregious as to result in a miscarriage of justice, and therefore reversal is not required. People v Winchell, 171 Mich App 662; 430 NW2d 812 (1988).

Review of the record, particularly the overwhelming evidence supporting the jury's verdict and the excellent cross-examination of the officer on rebuttal, as well as the findings of the jury, convinces us no miscarriage resulted from the improper rebuttal testimony.

Finding no error warranting reversal, we affirm defendant's convictions and sentences.

/s/ Clifford W. Taylor
/s/ Elizabeth A. Weaver
/s/ Michael R. Smolenski

28 USCS § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals

for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did

not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

MICHIGAN COURT RULES OF 1985

CHAPTER 6

Criminal Procedure

Subchapter 6.500 Postappeal Relief

Rule 6.501 Scope of Subchapter

Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court or the Recorder's Court for the City of Detroit not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter.
(Current as of 1/01/2004)

Rule 6.502 Motion for Relief From Judgment

(A) Nature of Motion. The request for relief under this subchapter must be in the form of a motion to set aside or modify the judgment. The motion must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge.

(B) Limitations on Motion. A motion may seek relief from one judgment only. If the defendant desires to challenge the validity of additional judgments, the defendant must do so by separate motions. For the purpose of this rule, multiple convictions resulting from a single trial or plea proceeding shall be treated as a single judgment.

(C) Form of Motion. The motion must be typed or legibly handwritten and include a verification by the defendant or defendant's lawyer in accordance with MCR 2.114. The motion must be substantially in the

form approved by the State Court Administrator, and must include:

(1) The name of the defendant;
(2) The name of the court in which the defendant was convicted and the file number of the defendant's case;
(3) The place where the defendant is confined, or, if not confined, the defendant's current address;
(4) The offenses for which the defendant was convicted and sentenced;
(5) The date on which the defendant was sentenced;
(6) Whether the defendant was convicted by a jury, by a judge without jury, or on a plea of guilty, guilty but mentally ill, or nolo contendere;
(7) The sentence imposed (probation, fine, and/or imprisonment), the length of the sentence imposed, and whether the defendant is now serving that sentence;
(8) The name of the judge who presided at trial and imposed sentence;
(9) The court, title, and file number of any proceeding (including appeals and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed;
(10) The name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;
(11) The relief requested;
(12) The grounds for the relief requested;

(13) The facts supporting each ground, stated in summary form;
(14) Whether any of the grounds for the relief requested were raised before; if so, at what stage of the case, and, if not, the reasons they were not raised;
(15) Whether the defendant requests the appointment of counsel, and, if so, information necessary for the court to determine whether the defendant is entitled to appointment of counsel at public expense.

Upon request, the clerk of each court with trial level jurisdiction over felony cases shall make available blank motion forms without charge to any person desiring to file such a motion.

(D) Return of Insufficient Motion. If a motion does not substantially comply with the requirements of these rules, the court may direct that it be returned to the defendant with a statement of the reasons for its return. The clerk of the court shall retain a copy of the motion.

(E) Attachments to Motion. The defendant may attach to the motion any affidavit, document, evidence, or memorandum of law to support the relief requested.

(F) Amendment and Supplementation of Motion. The court may permit the defendant to amend or supplement the motion at any time.

(G) Successive Motions.

(1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only

one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

(Current as of 1/01/2004)

Rule 6.503 Filing and Service of Motion

(A) Filing; Copies.

(1) A defendant seeking relief under this subchapter must file a motion, together with two copies, with the clerk of the court in which the defendant was convicted and sentenced.
(2) Upon receipt of a motion, the clerk shall file it under the same number as the original conviction.

(B) Service. The clerk shall serve a copy of the motion and notice of its filing on the prosecuting attorney. Unless so ordered by the court as provided in this subchapter, the filing and service of the motion does not require a response by the prosecutor.

(Current as of 1/01/2004)

Rule 6.504 Assignment; Preliminary Consideration by Judge; Summary Denial

(A) Assignment to Judge. The motion shall be presented to the judge to whom the case was assigned at the time of the defendant's conviction. If the appropriate judge is not available, the motion must be assigned to another judge in accordance with the court's procedure for the reassignment of cases.

(B) Initial Consideration by Court.

(1) The court shall promptly examine the motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack. The court may request that the prosecutor provide copies of transcripts, briefs, or other records.

(2) If it plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings. The order must include a concise statement of the reasons for the denial. The clerk shall serve a copy of the order on the defendant and the prosecutor. The court may dismiss some requests for relief or grounds for relief and direct further proceedings as to others.

(3) If the motion is summarily dismissed under subrule (B)(2), the defendant may move for reconsideration of the dismissal within 21 days after the clerk serves the order. The motion must concisely state why the court's decision was based on a clear error and that a different

decision must result from correction of the error. A motion which merely presents the same matters that were considered by the court will not be granted.

(4) If the entire motion is not dismissed under subrule (B)(2), the court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505-6.508.

(Current as of 1/01/2004)

Rule 6.505 Right to Legal Assistance

(A) Appointment of Counsel. If the defendant has requested appointment of counsel, and the court has determined that the defendant is indigent, the court may appoint counsel for the defendant at any time during the proceedings under this subchapter. Counsel must be appointed if the court directs that oral argument or an evidentiary hearing be held.

(B) Opportunity to Supplement the Motion. If the court appoints counsel to represent the defendant, it shall afford counsel 56 days to amend or supplement the motion. The court may extend the time on a showing that a necessary transcript or record is not available to counsel.

(Current as of 1/01/2004)

Rule 6.506 Response by Prosecutor

(A) Contents of Response. On direction of the court pursuant to MCR 6.504(B)(4), the prosecutor shall respond in writing to the allegations in the motion. If the response refers to transcripts or briefs that are not in

the court's file, the prosecutor shall submit copies of those items with the response.

(B) Filing and Service. The prosecutor shall file the response and one copy with the clerk of the court and serve one copy on the defendant.

(Current as of 1/01/2004)

Rule 6.507 Expansion of Record

(A) Order to Expand Record. If the court does not deny the motion pursuant to MCR 6.504(B)(2), it may direct the parties to expand the record by including any additional materials it deems relevant to the decision on the merits of the motion. The expanded record may include letters, affidavits, documents, exhibits, and answers under oath to interrogatories propounded by the court.

(B) Submission to Opposing Party. Whenever a party submits items to expand the record, the party shall serve copies of the items to the opposing party. The court shall afford the opposing party an opportunity to admit or deny the correctness of the items.

(C) Authentication. The court may require the authentication of any item submitted under this rule.

(Current as of 1/01/2004)

Rule 6.508 Procedure; Evidentiary Hearing; Determination

(A) Procedure Generally. If the rules in this subchapter do not prescribe the applicable procedure, the court may proceed in any lawful manner. The court may apply the rules applicable to civil or criminal proceedings, as it deems appropriate.

(B) Decision Without Evidentiary Hearing. After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an evidentiary hearing is required. If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument.

(C) Evidentiary Hearing. If the court decides that an evidentiary hearing is required, it shall schedule and conduct the hearing as promptly as practicable. At the hearing, the rules of evidence other than those with respect to privilege do not apply. The court shall assure that a verbatim record is made of the hearing.

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

(E) Ruling. The court, either orally or in writing, shall set forth in the record its findings of fact and its conclusions of law, and enter an appropriate order disposing of the motion.

(Current as of 1/01/2004)

Rule 6.509 Appeal

(A) Availability of Appeal. Appeals from decisions under this subchapter are by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205. The 12-month time limit provided by MCR 7.205(F)(3), runs from the decision under this subchapter. Nothing in this subchapter shall be construed as extending the time to appeal from the original judgment.

(B) Responsibility of Appointed Counsel. If the trial court has appointed counsel for the defendant during the proceeding, that appointment authorizes the attorney to represent the defendant in connection with an application for leave to appeal to the Court of Appeals.

(Current as of 1/01/2004)

Supreme Court, U.S.
FILED
APR 2 1 2004
OFFICE OF THE CLERK

No. 03-1079

IN THE SUPREME COURT OF THE UNITED STATES

PATRICIA L. CARUSO,
Director, Michigan Department of Corrections,

Petitioner

vs.

KEVIN MARK ABELA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

RESPONDENT'S ANSWER TO
PETITION FOR WRIT OF CERTIORARI

LIMITED APPEARANCE OF COUNSEL

CERTIFICATE OF SERVICE

JAMES STERLING LAWRENCE (P33664)
Attorney for Respondent Abela
717 Penobscot Building
Detroit, MI 48226
(313) 965-4189

No. 03-

IN THE SUPREME COURT OF THE UNITED STATES

PATRICIA L. CARUSO,
Director, Michigan Department of Corrections,

Petitioner

vs.

KEVIN MARK ABELA,

Respondent.

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

Respondent Kevin Abela, by and through his attorney James S. Lawrence, hereby moves to proceed in forma pauperis, and says:

1. Respondent Kevin Abela was a Habeas Corpus petitioner. He retained attorney James S. Lawrence to represent him in state court motions, and in the United States District Court and the Sixth Circuit Court of Appeals. The fees were actually paid by a relative of Respondent.

2. During the pendency of this matter in the Sixth Circuit Court of Appeals, Kevin Abela discharged from parole, and moved to the country from which his ancestors came, Malta, a country consisting of a small group of islands in the Mediterranean Sea, considered to be part of Europe.

3. Counsel has had contact with Mr. Abela by phone and letter. Counsel advised Mr. Abela of the fees and costs involved in defending against the Petitioner warden's Petition for Writ of Certiorari. Mr. Abela indicated that he would like to have present counsel represent him in the United States Supreme Court, but he cannot afford the fees and costs.

4. It was the intention of present counsel not to file a response to the Petition for Writ of Certiorari because not retained, however, he received a request from this Court requesting (but not ordering) that he prepare a response.

5. There is some burden upon counsel in doing the work for free. There would be much greater burden on counsel in also paying printing costs and other possible costs (such as traveling to Washington, D.C. for oral argument) if he is not to be paid at all. Counsel operates a one-attorney law office and is not wealthy. By filing on 8 1/2 " by 11" paper, instead of the special booklets otherwise required by court rule, counsel can fulfill this Court's request for an Answer, without undergoing undue hardship.

6. It is counsel's understanding that Respondent Abela has written to the United States Supreme Court asserting his indigence and requesting that present counsel be appointed as his attorney for the United States Supreme Court.

7. Counsel does not presently have an affidavit of indigence signed by Mr. Abela, but only his verbal representations of indigence. Counsel recognizes that Supreme Court Rule 39 requires such an affidavit. Respondent submits that under the unique circumstances of this case, this Court should permit him to appear in forma pauperis, so that counsel may comply with the Supreme Court's request to file an Answer, without placing undue financial burden upon counsel.

8. Counsel has forwarded to Mr. Abela in Malta a proposed affidavit of indigence. If and when Mr. Abela returns it, counsel will promptly file it with the United States Supreme Court.

WHEREFORE, Respondent Kevin Abela moves for leave to proceed in forma pauperis.

Respectfully submitted,

JAMES STERLING LAWRENCE (P33664)
Attorney for Respondent Abela
717 Penobscot Building
Detroit, MI 48226
(313) 965-4189

Dated: 4-19-04

QUESTIONS PRESENTED

Respondent Kevin Abela was convicted of manslaughter and carrying a concealed weapon, in a trial based in part on Respondent's statements made during questioning by police while he was severely injured, ill, and recovering from surgery. Petitioner Patricia Caruso, director of the Michigan Department of Corrections, seeks certiorari from a ruling of the Sixth Circuit Court of Appeals that held Respondent Abela's Habeas Corpus petition was timely filed. The question presented by Petitioner's petition is:

QUESTION 1: DOES THE TOLLING PERIOD OF 28 U.S.C. § 2244(d)(2) FOR A "STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW" APPLY TO THE TIME WHEN A PETITION FOR WRIT OF CERTIORARI IS PENDING AFTER STATE COURT DENIAL OF SUCH REVIEW.

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No. 03-

IN THE SUPREME COURT OF THE UNITED STATES

PATRICIA L. CARUSO,
Director, Michigan Department of Corrections,

Petitioner

vs.

KEVIN MARK ABELA,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI

KEVIN ABELA, Respondent, by and through his attorney, James S. Lawrence, hereby opposes the Respondent's Petition for Writ of Certiorari.

OPINIONS BELOW

These are stated and enclosed in Petitioner's petition. However, Petitioner mischaracterizes the Michigan Supreme Court ruling of May 28, 1998 (PWC, 1), by calling it a finding that issues were barred from consideration by procedural default. The Michigan Supreme Court made no such ruling.

The Michigan Supreme Court denied leave to appeal on the ground that Respondent had not made the showings required by court rule M.C.R. 6.508(D). This is not a ruling of procedural default. As the Michigan Supreme Court made clear in *People v. Jackson*, 465 Mich. 390 (2001), M.C.R. 6.508(D) applies a rule of "cause and prejudice" to collateral review motions, and a citation to M.C.R. 6.508(D) could be a showing of lack of "cause" for not filing earlier, or could be a showing of lack of "prejudice." Specifically, they found that because the issue lacked merit, it was denied under M.C.R. 6.508(D):

> "Pursuant to M.C.R. 6.508(D), "[t]he defendant has the burden of establishing entitlement to the relief requested." The circuit judge's second opinion discussed the merits of the juvenile court waiver issue and found it to be without merit. Accordingly, the defendant failed to establish his entitlement to relief. Thus, the defendant has not been deprived of review of that issue by the operation of subrule (D)(3)."

In this case, the trial court considered the merits of the issues and made no finding of procedural default. The Michigan Supreme Court never

overturned the action of the trial court, and that trial court action is therefore law of the case. Under Michigan law, a point decided by a lower court in favor of the appellant is not before the reviewing court unless the appellee files a cross-appeal. *Malcolm v. City of East Detroit*, 437 Mich. 132, 148 (1991); *Bruce Township v. Gout*, 207 Mich. App. 554 (1995).

There is therefore no ruling of any Michigan court finding that Respondent Abela committed procedural default or was subject to barring of issues because of procedural default.

STATEMENT OF JURISDICTION

Respondent agrees that the United States Supreme Court has jurisdiction under 28 U.S.C. § 1254(1), however, Respondent notes that Petitioner is seeking interlocutory review. The underlying matter was remanded by the en banc court to the panel for a decision on the merits. That is being argued April 21, 2004 at the Sixth Circuit in Cincinnati.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has correctly identified the main statutory provision involved, 28 U.S.C. § 2244(d).

Another statutory provision of importance is 28 U.S.C. § 2263(b)(2), the timing provision for death penalty cases:

"(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled -

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if -

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254;

and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section."

STATEMENT OF THE CASE

PROCEDURAL FACTS

Respondent Kevin Abela (Petitioner in the United States District Court)was convicted of manslaughter and CCW in the Oakland County, Michigan, Circuit Court, upon his trial for second degree murder and CCW

in the death of Stanley Underwood. Case No. 90-101083-FC. He was found not guilty of assaultive crimes where it was charged he assaulted prosecution witnesses Dan McAllister, Jerry Sullivan, and Jacob Sullivan. Trial and sentencing took place in Oakland County Circuit Court before the Hon. John N. O'Brien. On July 29, 1991, Respondent was sentenced to prison for 7 to 15 years for manslaughter and a concurrent 3 years 4 months to 5 years for CCW.

An appeal of right raising different issues was denied by the Court of Appeals on July 22, 1994, Case No. 144005. The Michigan Supreme Court denied leave to appeal March 31, 1995, Case No. 100783. The Motion for Relief from Judgment was filed April 14, 1996. On August 20, 1996, successor Judge John J. McDonald issued an order directing the prosecutor to file an answer, which they did. On October 22, 1996, Judge McDonald issued a one page order denying the motion, not for any procedural shortcoming, but for lack of merit. The Court of Appeals denied leave to appeal on July 22, 1997, Case No. 200930. The Michigan Supreme Court denied leave to appeal on May 28, 1998, Case No. 110260. The United States Supreme Court denied a Petition for Writ of Certiorari on October 19, 1998, Case No. 98-327.

On December 13, 1999, the United States District Court, Eastern District of Michigan, Southern Division, denied Respondent's Motion to

Dismiss, holding that the Petition for Habeas Corpus was not barred by the statute of limitations set forth in 28 U.S.C. § 2244.

On October 31, 2000, the District Court denied the Petition for Habeas Corpus. On December 28, 2000, the District Court denied Respondent Abela's Motion for Certificate of Appealability.

On April 20, 2001, the Sixth Circuit issued its Order granting Respondent's Motion for Certificate of Appealability. A ruling by a 3 judge panel was issued October 30, 2002, affirming the District Court on a different basis, that the Petition for Habeas Corpus was untimely filed. By order of January 21, 2003, the Sixth Circuit granted Rehearing En Banc. By published en banc decision of the Sixth Circuit, *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003), the Court found the Petition for Habeas Corpus was timely filed, and remanded to the panel for consideration of the underlying issues. Oral argument before the Sixth Circuit panel is scheduled for April 21, 2004.

FACTS REGARDING THE TRIAL

There was a party at the house of Al Howard on the evening of May 18 and early morning of May 19, 1990. (T June 11, 118). There were three fights, the last of which resulted in the death of Stanley Underwood. Respondent claimed self-defense.

There was an incident outside (the first fight) where Jacob (JJ) Sullivan and Respondent Abela had a fight, and JJ got a black eye. (T June 13, 199-201; T June 20, 81-86). JJ testified he did not know why Respondent suddenly attacked him. (T June 13, 42, 48). James Dakroub testified he observed arguing between JJ and Respondent regarding pushing of a car, and the next thing he knew they were in the street fighting. (T June 13, 199-201). Respondent testified he criticized JJ for trying to push a car where it would hit another car, that JJ threatened him, then shoved him, put him in a headlock, took him to the ground, and Respondent fought back. (T June 20, 81-86). He then looked for his glasses, which were broken. (T June 20, 86, 92).

JJ ran in the house to complain. (T June 11, 187, 236; T June 13, 95). His brother Jerry Sullivan, on learning of the first fight, ran out of the house, accompanied by others, and attacked Respondent Abela (the second fight). (T June 11, 121-126, 188-190, 215; T June 13, 12, 98, 226, 268; T June 18, 64, 252-266; T June 20, 86-96).

Respondent and Ron Wright left the party, but Ron Wright wanted to go back and get his coat which JJ Sullivan had. Respondent Abela waited at a driveway down the street from the party, with a broken nose, and broken glasses. Suddenly several people who looked like blurs to him, because he was not wearing his glasses broken in the earlier fight, ran at

him, attacked him, and had him on the ground. Stanley Underwood was on top of Respondent. (T June 18, 45, 273). Respondent was flattened to the ground by "all these people." He did not know who was on top of him, but he stabbed because he was seriously injured and afraid of greater injuries. Respondent drew his knife, which he used at work, from a sheath on his belt. Respondent stabbed upwards, resulting in the death of Underwood. Respondent fled the scene, and turned himself in. (T June 11, 270-277; T June 18, 41-45, 66, 200, 252-253, 266-267: T June 20, 11, 99-110).

Police officers testified that they took Respondent to the hospital, that he had broken bones in his face, and was treated in the emergency room. (T June 18, 202, 232). They found Respondent's broken eyeglasses with blood on them. (T June 18, 79).

Prosecution witness Dan McAllister told police that when he got to the (third) fight it was already going on, and "everyone was piling on" Respondent Abela. (T June 18, 294-296). McAllister testified in court that he saw the whole third fight, and no one was piling on. (T June 18, 116-124). He broke his foot in the incident, but did not know whether he kicked Respondent in the face. (T June 18, 130, 147). Jerry Sullivan admitted kicking Respondent "several times" in the face during the third fight. (T June 13, 114, 191). Al Howard, host of the party, said Jerry was not among those present during the third fight, as did Marty Semble. (T

June 11, 143; T June 18, 41-44). Marty Semble, who did not know Respondent or his companion Ron Wright (T June 18, 33) testified that the soon-to-be deceased, Stan Underwood, was on top of Respondent hitting him. (T June 18, 44-45, 64).

Deputy Gary Murray testified that when he got to the party, people were trying to hide beer, and many people were drunk, including a 15 year old girl. (T June 18, 194). Deputy Michael McCabe also testified to the drunkenness of the partygoers. (T June 18, 229).

Dr. Ljubisa Dragovic did the autopsy of Stanley Underwood on May 19, 1990. He was 6' tall, 214 pounds with an athletic body, and about 22 years old. His blood alcohol level was .22. He had no illegal drugs in his system. (T June 11, 61, 76, 80). He was killed by a stab wound to the chest. (T June 11, 61-71). Respondent's knife (exhibit 2) was consistent with the wounds. (T June 11, 72). All the wounds were made quickly, in a period of a few seconds. (T June 11, 80).

REASONS FOR DENYING THE WRIT

1. **This is an interlocutory appeal. The issue could become moot before decision.** This is an interlocutory appeal by the Petitioner

warden. The more common practice is for the United States Supreme Court to grant review in cases where there has been a final judgment below.

We still have not had the Sixth Circuit panel ruling on the merits of the Habeas Corpus appeal, to be argued April 21, 2004. If that ruling goes against Respondent Abela, then the Respondent's claim of error will be moot. In other words, if Respondent Abela loses his Sixth Circuit appeal, Petitioner Caruso will win regardless of the outcome of this Petition for Writ of Certiorari, which would make the outcome of this Petition for Writ of Certiorari irrelevant to the outcome of the case.

If the panel ruling goes against Respondent Abela, and this Court grants certiorari to Petitioner Caruso, Respondent Abela will seek review of all the rulings in the case that go against him. It would be appropriate to delay any decision on Petitioner's petition until after the Sixth Circuit panel ruling so that the entire case can be considered together.

2. **Petitioner has waived the issue of timeliness by not appealing the United States District Court ruling finding that Respondent Abela's Petition for Habeas Corpus was timely filed.** In *Searcy v. Carter*, 246 F.3d 515 (6th Cir. 2001), the Court stated:

> "As we have repeatedly recognized, when AEDPA applies, "a court of appeals will address only the issues which are specified in the certificate of appealability." See, e.g., *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1074

(6th Cir. 1997), overruled in part by *Lindh v. Murphy*, 521 U.S. 320 (1997)."

In accord, see *Hunt v. Mitchell*, 261 F.3d 575 (6th Cir. 2001). Respondent Abela, as Habeas Corpus petitioner, did not raise in his Motion to Issue Certificate of Appealability any claim regarding timeliness. The issue cannot be heard at the behest of the Respondent.

The issue also cannot be heard at the behest of the Petitioner warden, because the Petitioner chose not to appeal. Petitioner could have filed a Notice of Appeal, even though another party was also appealing. F.R.A.P. 3, 4. The failure to appeal amounted to a waiver of the right to complain about the District Court ruling. See *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140; 106 S.Ct. 466; 88 L.Ed.2d 435 (1985).

In *Vance v. Pilot Life Insurance Co.*, 810 F.2d 202 (6th Cir. 1986), the insurance company filed as appellant, and Vance filed an appeal as cross-appellant, but his filing was untimely. The Court held that Vance's complaints of error in the District Court proceedings could not be heard on appeal, but the insurance company's claims of error could be heard. The same ruling was made in *Chaney v. Mobley*, 791 F.2d 931 (6th Cir. 1986) [late filing as cross-appellant deprived Court of Appeals of jurisdiction to hear claims of error advanced by appellee].

See also *Davis v. Mutual Life Insurance Co.*, 6 F.3d 367 (6th Cir. 1993) [where only one appellee filed for appeal as cross-appellant, only that appellee could complain of alleged errors in the District Court ruling.]

It is improper for a Habeas Corpus court to raise defenses for the State that the State has chosen not to raise. In *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002), the District Court attempted to dismiss a case on timeliness grounds not asserted by the State in its pleadings. The Sixth Circuit ruled this was not a jurisdictional issue. The Court further ruled that the District Court lacked the authority to raise the defense on behalf of the State because the State had waived the issue by not raising it in an Answer. The same rule should apply here, where the State has waived the issue by not appealing.

An appellee has no pending challenge to the District Court ruling. An appellee cannot call upon the Court of Appeals to overturn rulings of the District Court; only an appellant can do that. The choice of the appellee not to become a cross-appellant was a waiver of the right to cross-appeal, and therefore a waiver of the right to ask the Court of Appeals, and this Court, to overturn portions of the District Court ruling.

3. **To grant Petitioner's requested relief would require this Court to overturn the ruling in *Duncan v. Walker*, 533 U.S. 167; 121 S. Ct. 2120; 150 L. Ed. 2d 251 (2001).** In non-death penalty cases, tolling

continues during "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d). In death penalty cases, tolling continues "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition." 28 U.S.C. § 2263(b)(2).

Petitioner's position is that State post-conviction or other collateral review is not "pending" after the ruling of the state Supreme Court, while the matter is on review at the United States Supreme Court. However, to follow that interpretation, this Court would have to interpret the language of 28 U.S.C. § 2244(d) as meaning exactly the same thing as the language in 28 U.S.C. § 2263(b)(2), even though Congress used different language in the two provisions.

In *Duncan v. Walker*, 533 U.S. 167; 121 S. Ct. 2120; 150 L. Ed. 2d 251 (2001), this Court held:

> "It is well settled that [w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Duncan v. Walker holds that two statutory provisions involving different language should not be interpreted the same, and that it is presumed that Congress used the differing language for a reason. Since

this ruling is only 3 years old, we presume that the Supreme Court is not ready to overturn it. Since Petitioner's interpretation of the statute requires *Duncan v. Walker* to be overruled, there is no point in granting certiorari.

4. **Petitioner has mischaracterized much of the case law cited.** This case involves a Habeas Corpus petitioner, Respondent Abela, who did go to the United States Supreme Court after losing in the Michigan Supreme Court on collateral review. Seven of the ten the cases cited by Petitioner as rejecting Respondent's position on timeliness (PWC, 8) do not involve this situation. These cases, which have been mischaracterized by Petitioner, involve a Habeas Corpus petitioner who could have, but did not, go to the United States Supreme Court.

The seven cases mischaracterized by Petitioner contain no holdings concerning what happens when a Habeas Corpus petitioner actually does go to the United States Supreme Court upon losing collateral review in the state Supreme Court: *Smaldone v. Senkowski*, 273 F.3d 133 (2d Cir. 2001); *Stokes v. District Attorney of the County of Philadelphia*, 247 F.3d 539 (3d Cir. 2001); *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999); *Gutierrez v. Schomig*, 233 F.3d 490 (7th Cir. 2000); *White v. Klitzkie*, 281 F.3d 920 (9th Cir. 2002); *Coates v. Byrd*, 211 F.3d 1225 (11th Cir. 2000); *Isham v. Randle*, 226 F.3d 691 (6th Cir. 2000).

5. **The case law of other circuits on which Petitioner relies has all been based on a false premise.** There has been a "creeping" of the case law. Original case law sets forth positions that do not affect this Respondent, that a collateral review litigant who does not go to the United States Supreme Court should not get credit as if he did go there. However, some cases take that original case law and claim that it compels a decision which was not actually made in those earlier cases.

The first case that actually does make a holding against a Habeas Corpus petitioner who did go to the United States Supreme Court upon losing collateral review in the state Supreme Court is *Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999).

The ruling in *Rhine v. Boone* states: "proceedings before the United States Supreme Court seeking review of a state habeas corpus application do not toll the one-year limitations period." In support of that proposition the Court cites 6 cases, none of which contain the holding they are cited for: *Stokes, Ott, Isham, Snow, Bunney,* and *Coates*, all supra. None of the cited cases in *Rhine v. Boone* involved a person who actually filed in the United States Supreme Court. A ruling that relies on a citation to cases for propositions that are not in their holdings is of questionable validity.

The next case to follow the rule Petitioner would follow, *Crawley v. Catoe*, 257 F.3d 395 (4th Cir. 2001), cites as its authority *Rhine v. Boone*. The

final case to follow the rule Petitioner would follow, *Miller v. Dragovich*, 311 F.3d 574 (3rd Cir. 2001) cites *Rhine v. Boone* and *Crawley v. Catoe*.

In other words, the holding in *Rhine v. Boone* is based on a false premise, that is, that the cases of *Stokes, Ott, Isham, Snow, Bunney,* and *Coates,* contain holdings that they do not, in fact, contain. All other cases following *Rhine v. Boone* are based on the authority of *Rhine v. Boone* and are equally as erroneous because all based on the same false premise.

6. **There is ample case law directly supporting the Sixth Circuit ruling.** In *Morris v. Horn*, 187 F.3d 333 (3d Cir. 1999), the Petitioner had filed in state court for collateral review, which was denied by the Pennsylvania Supreme Court in 1996. On December 1, 1996, the Petitioner filed a Petition for Writ of Certiorari with the United States Supreme Court. On June 23, 1997, the United States Supreme Court denied certiorari. The Third Circuit ruled that the statute was "tolled from April 2, 1990 until June 23, 1997." This holding is directly on point, and directly holds that the time spent by a litigant in seeking United States Supreme Court review from a denial of state court collateral review does not count against the Petitioner's year.

In *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001), the Court recognized the authority of *Morris v. Horn*. However, using an analysis similar to that used by the Sixth Circuit in *Isham v. Randle*, the Court distinguished *Morris v.*

Horn and ruled that the collateral review is not "pending" beyond the final state court ruling where no Petition for Writ of Certiorari to the United States Supreme Court is actually filed.

In *White v. Klitzkie*, 281 F.3d 920 (9th Cir. 2002), no Petition for Writ of Certiorari was filed with the United States Supreme Court, so the case, like *Nara v. Frank*, is somewhat different than at bar. However, the comments of Judge Berzon in dissent support Petitioner's position. Among the points he made were:

a) Congress could not have intended, and did not intend, a scheme whereby a Petitioner might be required to file in one court before he was finished with a preceding court.

b) State court collateral review is still "pending" until the petition filed is finally decided, and that includes United States Supreme Court review where applied for. Until the United States Supreme Court rules, the collateral review has not been "finally decided," because the United States Supreme Court has the authority to overturn the state court ruling. "The application does not thereby stop being a state habeas proceeding or turn into a federal rather than a state application; it is just not finally decided yet."

c) United States Supreme Court review of a state court ruling is not an application for federal post-conviction or collateral review, the only

authority for which is found in 28 U.S.C. § 2254. The United States Supreme Court is not performing §2254 review when considering a Petition for Writ of Certiorari from the decision of a state court.

d) The differing language between the death penalty review provisions, 28 U.S.C. § 2263(b)(2), and the review provisions for other cases, 28 U.S.C. § 2244(d)(2), demonstrates that the state court collateral review is still "pending" while under consideration by the United States Supreme Court, using the rules of statutory construction followed by the United States Supreme Court in *Duncan v. Walker*. Judge Berzon stated:

> "The language in § 2263(b)(2) concerning tolling for state habeas petitions differs from that contained in § 2244(d)(2), which omits the phrase "until the final State court disposition of such petition." As *Duncan* noted in interpreting § 2244(d)(2): "It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion." Id. at 2124 (internal quotations omitted). Congress' decision to include the language "until the final State court disposition of such petition " in § 2263(b)(2), but to omit it in § 2244(d)(2), indicates that Congress intended the tolling period to end with "the final State court disposition" in situations controlled by § 2263(b)(2), but to continue for as long as the application "is pending" in situations controlled by § 2244(d)(2)."

7. **Case law of the United States Supreme Court, involving slightly different situations, also supports the Sixth Circuit ruling.**

In *Clay v. United States*, 537 U.S. 522 (2003), a case involving a federal prisoner's motion under 28 U.S.C. § 2255, the Court held:

> "Here, the relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."

If that rule applies to a petition of a state prisoner under 28 U.S.C. § 2254, then Respondent Abela's position, as well as that of the Sixth Circuit, is obviously correct and should be left undisturbed.

In *Caspari v. Bohlen*, 510 U.S. 383; 114 S.Ct. 948; 127 L.Ed.2d 236 (1994), the Court, admittedly in a different context, defined "finality" of a state court conviction and sentence as not occurring until after the United States Supreme Court has ruled:

> "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."

See also *Lambrix v. Singletary*, 518 U.S. 518; 117 S.Ct. 1517; 137 L.Ed.2d 771 (1997), holding that there is no "finality" until the time for applying to the United States Supreme Court has expired:

> "Lambrix's conviction became final on November 24,

> 1986, when his time for filing a petition for certiorari expired."

And see also *Allen v. Hardy*, 478 U.S. 255, fn. 1; 106 S.Ct. 2878; 92 L.Ed.2d 199 (1986)(also in a slightly different context than here):

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed."

See also *Blasi v. Attorney General of Pennsylvania*, 30 F. Supp. 2d 41 (M.D. Pa. 1998); *Deerwester v. Carter*, 26 F. Supp. 2d 2080 (C.D. Ill. 1998); *Torres v. Irvin*, 33 F. Supp. 2d 257 (S.D.N.Y. 1998); *Souch v. Harkins*, 21 F. Supp 2d 1023 (D. Ariz. 1998); *Moore v. Hawley*, 7 F. Supp. 2d 901 (E.D. Mich. 1998).

Petitioner Caruso has not cited any United States Supreme Court holdings to the contrary. Accordingly, the state court collateral review was not completed until the United States Supreme Court denied certiorari, in this case where a Petition for Writ of Certiorari was actually and timely filed.

8. **Applying rules of statutory construction to this case.**

Under *Duncan v. Walker*, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and

purposely in the disparate inclusion or exclusion." Where Congress in death penalty cases ends the tolling with "the final State court disposition of such petition," but in non-death penalty cases continues the tolling while review is "pending," *Duncan v. Walker* commands that the reviewing court presume that Congress used that differing language for a reason. Therefore, a statutory interpretation that treats the two provisions as being exactly the same (that tolling ends with the final State court disposition of the collateral review) is presumed to be incorrect.

The question to be addressed in non-death penalty cases is when is a matter still "pending?" Black's Law Dictionary, 6th ed. p. 1134 (1990) defines "pending" as:

> "Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment."

We submit that a matter is "pending" as long as a court has before it a "properly filed" pleading, see *Artuz v. Bennett*, 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.E.2d 213 (2000), that could result in the ruling in a case being overturned. Because the Petition for Writ of Certiorari filed by Petitioner Abela in the United States Supreme Court could have resulted in an order reversing the state court denial of collateral review, the state court collateral review was still "pending" until the United States Supreme Court

disposed of his Petition. A matter is "pending" where it is still subject to reversal.

Accordingly, the ruling in *Duncan v. Walker* is readily explained. State court collateral review is not "pending" while a Petition for Habeas Corpus is pending in United States District Court, because the State court collateral review is over. The United States District Court in that case has before it a civil case.

In contrast, when one applies to the United States Supreme Court after losing collateral review in the highest court of the state, the matter filed in state court is still "pending," because the United States Supreme Court has the authority in that case to actually reverse the state court ruling.

This conclusion is further bolstered by the language of 28 U.S.C. § 2244(d)(1)(A), holding that the limitation period for filing federal Habeas Corpus begins at the earliest of certain options, including "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Under that provision, Congress recognizes that the state court conviction is not "final" until the United States Supreme Court has had its say, or the time to apply for that has expired. See *Bronaugh v. State*, 235 F.3d 280 (6th Cir. 2000). This recognizes the principle that a state court ruling is not final, and therefore

is still "pending," until United States Supreme Court review is completed. That principle is not compromised in any way by the differing treatment of the "could have filed" situation discussed in certain cases. Congress could legitimately provide that a matter is pending while actual United States Supreme Court review is ongoing, while at the same time provide that the uneffectuated right to seek United States Supreme Court review has tolling effect only under certain circumstances.

The District Court and Sixth Circuit en banc position on tolling makes sense. We submit that Congress intended for the state court prisoner to complete the collateral review proceedings before going forward in federal court with a Petition for Habeas Corpus, and not to require that the state prisoner file a Petition for Habeas Corpus before the collateral review process has been completed.

A clear example may help illustrate this principle. Suppose that a Petitioner, Mr. X, files state court collateral review within 1 week of losing in the state Supreme Court on his first appeal. After losing in the state Supreme Court again, he files a Petition for Writ of Certiorari with the United States Supreme Court within 1 week. The United States Supreme Court then takes more than a year to decide the Petition for Writ of Certiorari, ultimately denying it. Under the panel's ruling Petitioner would be barred from proceeding in Habeas Corpus at all, even though, under

Petitioner's position, only 2 weeks of the year had elapsed.

Why should the amount of time that a reviewing court spends considering a case determine whether a Petitioner can seek further review in other courts? Taking the example above, it is absurd to say that Mr. X can file a Petition for Habeas Corpus provided that the United States Supreme Court takes only 10 or 11 months to decide a Petition for Writ of Certiorari, but that he is barred if the United States Supreme Court takes a full year.

There is no indication in the AEDPA that Congress intended to make petitioners choose between a Petition for Writ of Certiorari to the United States Supreme Court and a Petition for Habeas Corpus to the United States District Court. We submit that Congress did not intend that by filing a Petition for Writ of Certiorari one would thereby lose the right to file a Petition for Habeas Corpus. We submit that while the United States Supreme Court review is pending, the time for filing in the District Court is tolled. Review in the United States Supreme Court of state court collateral review means that review is still "pending" under 28 U.S.C. § 2244(d)(2) and therefore seeking such review tolls the time for filing under that statute.

It is premature to file a Petition for Habeas Corpus before it is known whether the state Supreme Court will correct the constitutional violations.

After the state Supreme Court denies leave to appeal, to proceed with timely review in the United States Supreme Court would not be the failure to proceed with diligence to which the AEDPA is directed. It is just as premature to file a Petition for Habeas Corpus before it is known whether the constitutional violations will be addressed by the United States Supreme Court on a Petition for Writ of Certiorari, in those cases where a Petition for Writ of Certiorari is filed.

We therefore submit that seeking United States Supreme Court review is legitimate action that keeps other collateral review "pending" and does not eat up and eliminate the time for filing a Petition for Habeas Corpus.

In *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997), the Court examined unclear statutory language and determined that District Courts can issue Certificates of Appealability. The Court stated:

> "Because Congress may have intended that prisoners still have the choice of asking the district court to issue a certificate of appealability, a court should hesitate to take that right away from them. This lends some support to our conclusion that the AEDPA allows district courts to issue certificates of appealability."

Because Congress apparently did intend that prisoners still have the choice of seeking United States Supreme Court review in collateral review cases, a court should hesitate to take that right away from them, or to make the right subject to losing the right to file in Habeas Corpus.

The Petitioner's position would not lead to an endless, indefinite suspension of time limits in Habeas Corpus cases, as caused the Court to reject the Petitioner's position in *Searcy v. Carter*. The time to file in the United States Supreme Court is limited to 90 days, and the only further tolling would be during the time that the United States Supreme Court considers the Petition. This involves a discrete, easily measured time period that would not eviscerate the Habeas Corpus time limits as in *Searcy*, but would instead be in full compliance with them.

The fact that there are provisions for tolling at all demonstrates that Congress intended for the state prisoner to file in only one court at a time. Congress intended for the state court prisoner to complete the collateral review proceedings before going forward with Habeas Corpus, and not to require that the state prisoner file in the United States District Court while proceedings in other courts are still pending. This is so even though seeking United States Supreme Court review is an optional step.

As the Court stated in *Duncan v. Walker*, the statutes should be interpreted so as not to "increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." To force the hypothetical Petitioner X to file in United States District Court while the matter is pending in the United States Supreme Court would create piecemeal litigation, which the United States Supreme Court says was not

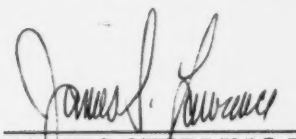
the intent of Congress.

The District Court was therefore correct in ruling that "the limitations period was tolled from May 28, 1998, when the Michigan Supreme Court denied leave to appeal, until October 19, 1998, when the United States Supreme Court denied certiorari." The Circuit Court ruling upholding that was correct and should not be disturbed.

CONCLUSION

Respondent Kevin Abela, the Habeas Corpus petitioner, respectfully submits that for the reasons stated above, this Court should deny the Petition for Writ of Certiorari. If the Petition for Writ of Certiorari is granted, it should be granted as to all the issues in the case, including any issues on which Respondent Abela may lose in the Sixth Circuit Court of Appeals upon full review of the merits by the panel.

Respectfully submitted,



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Dated: April 19, 2004

No. 03-

IN THE SUPREME COURT OF THE UNITED STATES

PATRICIA L. CARUSO,
Director, Michigan Department of Corrections,

Petitioner

vs.

KEVIN MARK ABELA,

Respondent.

LIMITED APPEARANCE OF COUNSEL

James Sterling Lawrence, attorney at law, hereby enters his limited appearance as counsel for Respondent Kevin Abela, limited to filing this Answer to the Petition for Writ of Certiorari. Although counsel has not been retained, he is filing the Answer in response to the request of the United States Supreme Court. Counsel is a member of the Bar of the United States Supreme Court.

Respectfully submitted,

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Dated: 4-19-04

No. 03-

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PATRICIA L. CARUSO,
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CERTIFICATE OF SERVICE

James Sterling Lawrence, attorney at law, hereby certifies that on this date he mailed 2 copies of the Motion to Proceed in Forma Pauperis, Respondent's Answer to Petition for Writ of Certiorari, Limited Appearance of Counsel, and Certificate of Service to:

Thomas L. Casey
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Respectfully submitted,

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